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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 714

IN THE MATTERS

of

THIRD AVENUE TRANSIT CORPORATION, *et al.*,

Debtors.

A. PHILIP WOOLFSON,

Petitioner,

against

LESTER T. DOYLE, as Trustee in Reorganization, *et al.*,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THIRD AVENUE TRANSIT CORPORATION, *et al.*,

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A. PHILIP WOOLFSON,

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—against—

LESTER T. DOYLE, AS TRUSTEE IN REORGANIZATION, *et al.*,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner herein prays that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on November 30, 1956, which affirmed orders of the District Court for the Southern District of New York approving a plan of reorganization and confirming the plan of reorganization.

Opinions Below

No opinion of the District Court was entered on confirmation of the plan. A memorandum opinion on the approval of the plan was rendered by the District Court.* The opinion of the United States Court of Appeal is not yet reported and is printed in Appendix B hereto, *infra*, p. 26.

Jurisdiction

The judgment of the Court of Appeals was entered on November 30, 1956, Appendix B, *infra*, p. 26. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254 (1).

Questions Presented

1. Whether an order confirming a plan of reorganization under Chapter X of the Bankruptcy Act is valid where the plan has not been accepted by adjustment bondholders holding two-thirds in amount of the allowed claims *filed by the indenture trustee* in that class of creditors.

2. Whether the failure of the trustee of debtor to transmit to stockholders and creditors notice of a hearing on approval of a completely new plan of reorganization pursuant to the requirements of Chapter X of the Bankruptcy Act and Rule X-18 of the Bankruptcy rules of the District Court for the Southern District of New York, is not violative of due process.

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* See "Opinion approving the Joint Plan of Reorganization" in Record document entitled "Information for Voting on Joint Plan of Reorganization", dated August 14, 1956, p. 7.

Statute Involved

The statutory provisions involved are Sections 101, *et seq.*, 169, 171, 179, 198, 221 of Chapter X of the Bankruptcy Act, 52 Stat. 840, 11 U. S. C. A., Sections 501, *et seq.*, 569, 571, 579, 598, 621. They are printed in Appendix A, *infra*, pp. 19-23.

Statement

An involuntary petition in bankruptcy was filed against Third Avenue Transit Corporation on October 25, 1948. On March 23, 1950, pursuant to order of the District Court entered November 30, 1949[1] the indenture trustee under the Third Avenue Railway Company Adjustment Mortgage Income Bonds filed verified proof of claim for $22,536,000

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[1] Paragraph (4) of that order, which conforms with the requirements of Rule X-14 (c) of the Bankruptcy Rules of the Southern District of New York, provided as follows:

> "(4) Proofs of claim by Indenture Trustees pursuant to Section 198 of the Bankruptcy Act shall be filed in writing on or prior to March 28, 1950 and verified by the Indenture Trustees and have annexed thereto a copy of the respective trust indentures and of all supplements thereto. Such proofs shall state the amount of securities then outstanding under the indentures and supplements thereto, and the amount of cash and securities, if any, held for account of the trusts. The amount of the claims filed by the Indenture Trustees shall be allowed only to the extent that such claims exceed the amount of such securities owned by the debtors and the amount of such securities on which proofs of claim are filed by the holders thereof and are allowed. The Indenture Trustees shall also file a verified statement containing a list of the names and addresses of security holders under said indentures together with the amounts held by each insofar as the same shall be known to them."

principal amount of adjustment mortgage bonds.[2] [3] No objection was thereafter filed to the proof of claim filed by the indenture trustee.[4]

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[2] Paragraphs 1, 3 and 4 of that proof of claim are as follows:

> "1. That Chemical Bank & Trust Company is the successor Trustee under Third Avenue Railway Company Adjustment Income Mortgage dated December 20, 1911, as supplemented and amended (hereinafter called the Adjustment Income Mortgage), executed and delivered by Third Avenue Railway Company to United States Mortgage and Trust Company, as Trustee, to secure an issue of Adjustment Mortgage Fifty-Year Five Per Cent. Income Bonds (hereinafter called the Adjustment Mortgage Bonds) of Third Avenue Railway Company; that the obligations of Third Avenue Railway Company in respect of the Adjustment Mortgage Bonds and under the Adjustment Income Mortgage was expressly assumed by Third Avenue Transit Corporation, one of the Debtors herein, by an Indenture dated as of July 1, 1942."
>
> "3. That the principal amount of the Adjustment Mortgage Bonds outstanding under the Adjustment Income Mortgage, as shown by the records of Chemical Bank & Trust Company, as Trustee thereunder, is $22,536,000."
>
> "4. That at the maturity of the Adjustment Mortgage Bonds, cumulative interest will be due and payable thereon as provided herein; as of March 1, 1950, cumulative interest accrued and unpaid on said bonds was in the amount of $23,343,840."

[3] The total amount of adjustment bonds outstanding in the hands of the public amounted to $22,215,900. Adjustment bonds repurchased and held in the Company's Treasury amounted to $320,100. The Company had outstanding in addition $14,830,550 of First Mortgage Bonds due in 1960, and 166,916 shares of no par Common stock.

[4] Rule X-14 (d) of the Bankruptcy Rules of the Southern District of New York provides with respect to allowance of claims as follows:

> "Every claim or interest for which a proof of claim or interest has been filed shall be deemed to be allowed until written objection is filed as provided herein."

On October 8, 1956 the District Court confirmed a reorganization plan for debtor although only $13,328,000 out of a total of $22,215,000 of the outstanding claims of adjustment bondholders (or 60 per cent) were voted for acceptance of the plan.[5] The District Court in fixing a date for the hearing on confirmation[6] had accepted the affidavit[7] by the Trustee of debtor that since $15,893,000 had voted on the plan and $13,328,000 had voted to accept, that the plan had been accepted by or on behalf of adjustment bondholders holding the required two-thirds in amount of the claims filed and allowed in that class.[8]

The reorganization plan confirmed by order of the District Court on October 8, 1956 had been approved by the District Court on July 24, 1956 at a hearing without notice to the debtor's stockholders and other interested parties.[9]

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[5] For the purposes of the plan and its acceptance the holders of the adjustment mortgage income bonds constituted a separate class pursuant to the order of the District Court of July 26, 1956 approving the Joint Plan of Reorganization (R., p. A 11). (All "R" references are to pages of the Record designated "Joint Appendix of A. Philip Woolfson, Appellant and Lester T. Doyle as Trustee in Reorganization, Appellee.")

[6] The conditions precedent to a hearing on confirmation of a reorganization plan in Chapter X proceedings are stated in Section 179 of the Bankruptcy Act (11 U. S. C. A. 579). Appendix A, *infra*, p. 18.

[7] R., p. A 23 and R., pp. A 390-391.

[8] $6,322,900 of adjustment bonds did not vote on the plan, although in a letter dated August 14, 1956 addressed to the adjustment bondholders by the trustee, they were advised that if the reorganization plan was to be taken advantage of "it is necessary that you act promptly and cast your ballot to accept the Joint Plan without delay."

[9] Petitioner is a beneficial owner of the adjustment bonds and common stock of debtor (since January, 1950) and a stockholder of record (since July, 1956). The securities of which petitioner is the beneficial owner have at all times been held by the New York Stock Exchange firm of Butler, Herrick & Marshall, 20 Broad Street, New York City.

This plan was the third reorganization plan filed by the Trustee, the first having been proposed in November, 1952, and a second plan in June, 1955.[10] This third plan[11] of reorganization differed completely from the previously proposed plans of reorganization since it involved the purchase of the debtor by another New York bus company, Fifth Avenue Coach Lines, Inc. and a completely different treatment of the claims of the security holders of debtor.[12] Notice of hearing on the Trustee's first plan of November, 1952 and of his second plan of July, 1955 had been given by the Trustee to the stockholders and creditors. The hearing before the District Court with respect to the completely new reorganization plan approved by it on July 24, 1956 (and thereafter confirmed) was held without notice to stockholders and adjustment bondholders. The Trustee did not transmit a copy or an outline of the new reorganization plan to all of the parties affected by the plan.[13]

Petitioner on August 15, 1956 filed a notice of appeal from the District Court's order of July 26, 1956 approving the Joint Plan of Reorganization and on October 10, 1956 filed a notice of appeal from the District Court's order of

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[10] R., p. A 8.

[11] The Trustee's plan, designated as the Joint Plan of Reorganization was the plan of a committee of adjustment bondholders as amended on June 26, 1956 which was adopted by the Trustee after withdrawal of his Second Amended Plan of Reorganization, as modified (R., p. A 10).

[12] R., p. A 10.

[13] The record is barren of any affidavit by the Trustee of debtor of notice of the hearing on the new plan to stockholders and creditors of the debtor. Moreover, in the order of the District Court approving the plan of reorganization the Court refers specifically to a "hearing" (R., p. A 10) and omits any reference to a "hearing on notice."

October 8, 1956 confirming the Joint Plan of Reorganization.[14]

The Court below affirmed the orders of the District Court approving the plan of reorganization and confirming the plan of reorganization on the following grounds:

1. That transmittal of notice of the hearing on approval of the instant plan to stockholders and creditors was not required since the statute contemplates a continuous process and "* * * the hearings may be adjourned from time to time without further notice other than the announcement of such adjournment in open court."

2. That the Bankruptcy Act did not require as a condition precedent to confirmation of the instant reorganization plan that two-thirds in amount of the adjustment bonds outstanding be voted for acceptance since "if only a few creditors are available and interested enough to vote, they should determine acceptance or rejection of the plan by their class."

Reasons for Granting the Writ

1. The decision of the Court below in the instant case with respect to the acceptances by the adjustment bondholders required to confirm the reorganization plan is directly in conflict with the decision of the Seventh Circuit Court of Appeals in "*In re Kenilworth Bldg. Corporation* (165 F. 2d 673)." (Appendix C, *infra*, p. 34)

In the instant case the Court of Appeals decided that acceptance of the reorganization plan by the holders of two-thirds of the entire issue of the adjustment bonds was not required for confirmation of the plan. Judge MEDINA, writ-

[14] Petitioner on October 8, 1956 had also filed a notice of appeal from the District Court's order denying motion by petitioner to reopen the question of insolvency of debtor (R., p. A 33; R., p. A 43).

ing for the Court below, defined the position of the Court as follows (Appendix B, *infra*, p. 30):

> "The question is simply whether acceptance by the holders of two-thirds of the entire issue is required or only by two-thirds of the amount claimed and allowed. * * * We think it not unreasonable to provide that if only a few creditors are available and interested enough to vote, they should determine acceptance or rejection of the Plan by their class. In any event, we are not at liberty to vary the requirement of the Act."[14a]

In the instant case it was a Trustee who filed the claims on behalf of the adjustment bondholders and the claims so filed were allowed (notes 1 and 2, page 3-4, *supra*). The Court of Appeals and the District Judge, as the foregoing indicates, disregarded the claims theretofore *filed by the indenture trustee and allowed,* and considered only as claims allowed those who voted.

In the *Kenilworth* case the reorganization plan was confirmed by the District Court despite the fact that consents to the plan represented only $47,800 worth of claims out of a total of $112,000 on the outstanding issue. The District Court in confirming the plan considered only the claims filed by the bondholders' committee or by the individual claimants and disregarded all the claims filed by the *trustee as here, and allowed by the Court.* The Court of Appeals in the *Kenilworth* case concluded that Sec. 77B requires the claims filed by the trustee and allowed, to be considered in determining the amount of the claims, two-thirds of which had to be represented by creditors assenting to the plan.

[14a] In computing the necessary majority the act does not require a *second* filing by the *individual* bondholders at the time of the voting (see p. 12 *infra*).

In the *Kenilworth* case it was the Court of Appeals' opinion that

> "under Section 77B the total amount of claims, two-thirds of which must be represented by assenting creditors, *includes the claims filed by an indenture trustee which are allowed.* * * * For the purpose of filing written acceptances no distinction is made between claims filed by an indenture trustee and allowed and claims filed by individual creditors or by someone expressly authorized to file for them. The only restriction placed upon claims is that they be claims of creditors and that they be allowed. If a claim has been filed and allowed, nothing in the Act authorizes the striking of such claim from the amount of claims to be considered for purposes of acceptance of the plan. In short, the total amount of all claims which have been allowed constitutes the amount of claims, two-thirds of which must be voted for acceptance."

2. The decision of the Court below in the instant case that a two-thirds vote of each class of creditors is not required to confirm a reorganization plan is directly in conflict with the construction of the applicable statute[15] by the Seventh Circuit Court of Appeals in *In re 333 No. Michigan Ave. Bldg. Corp.* (84 F. 2d 936) and by the Fifth Circuit Court of Appeals in *Texas Hotel Securities Corp.* v. *Waco Development Co.* (87 F. 2d 395).

The Seventh Circuit Court of Appeals, in construing the statutory requirements for acceptance of a reorganization plan, held in *In re 333 No. Michigan Ave. Bldg. Corp.* (84 F. 2d 936) as follows:

> "Under Section 77B the rights of all claimants and creditors are entitled to the same protection, but they

[15] Sec. 179 of the Bankruptcy Act, 11 U. S. C. A., Sec. 579 (Appendix A, *infra*, p. 20).

> may be divided into classes, as was done in this proceeding. That law requires a two-thirds vote of each class before a plan can be confirmed. (*Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110; *Louisville Joint Stock Land Bank* v. *Radford*, 294 U. S. 555, 55 S. Ct. 854, 79 L. Ed. 1593; *Cumberland Glass Manufacturing Co.* v. *De Witt*, 237 U. S. 447, 37 S. Ct. 636, 59 L. Ed. 1042). We find no expression of the Supreme Court which is at variance with this interpretation."[16]

The Fifth Circuit Court of Appeals in *Texas Hotel Securities Corp.* v. *Waco Development Co.* (87 F. 2d 395), construed the applicable statutory provision as follows:

> "The voting class embraces the holders of allowed claims without requirement as to when or how they became holders. * * * Section 77B, in order to impose a plan on dissenters requires an acceptance by two-thirds in amount of the affected class of creditors. Less than two-thirds cannot become two-thirds because some of the dissenters may be badly disposed. It is the consent of the specified majority that by a sort of democratic rule is made to be a consent of all which enables this Act to control the will of dissenting minorities."

3. The decision of the Court below affirming the District Court's Order confirming the reorganization plan is believed to be erroneous and the conflicting decision of the

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[16] Compare also *Case* v. *Los Angeles Lumber Products Co.* (308 U. S. 114) where this Court stated: "It is clear from a reading of Section 77B (f) that the Congress has required both that the required percentages of each class of security holders approve the plan and that the plan be found to be fair and equitable."

Seventh Circuit Court of Appeals in *In re Kenilworth Bldg. Corporation, supra,* correct. That the decision of the Court below is erroneous can be demonstrated algebraically as follows:

Let a = aggregate of claims filed and allowed
b = allowed claims voting on the plan
c = allowed claims not voting on the plan

$a = b + c$

Let x = allowed claims voting for the plan
y = allowed claims voting against the plan

$b = x + y$

The correct formula for computing the statutory majority of acceptances required before a plan can be confirmed is $\frac{x}{a}$ and not $\frac{x}{b}$.[17] In the instant case $\frac{x}{a} = \frac{13,328,000}{22,215,900} =$ 60%.[18]

4. The construction of Section 198 of the Bankruptcy Act (11 U. S. C. A. Sec. 598), Appendix A, *infra*, p. 19, by

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[17] The vice of the formula $\frac{x}{b}$ is that under such a formula the two-thirds requirement for acceptance by two-thirds of each class of creditors would become meaningless since the percentage of claims filed and allowed is no longer a definite and certain amount. It is conceivable that under such a formula a minority of creditors may be enabled to determine the fate of the majority of creditors of that class.

[18] The value of "a", i.e., the aggregate of claims filed and allowed of each class of creditors eligible to vote on acceptance of a reorganization plan is determined prior to submission of the plan to the security holders affected. (See 174 of the Bankruptcy Act, 11 U. S. C. A. §574, Appendix A, *infra*, p. 20.)

the Court below[19] is in direct conflict with the principle enunciated by an Appeals Court of the same Circuit in 1943. The Court at that time recognized that the existence of an indenture trustee did not modify the requirement of a two-thirds vote by each class of creditors for acceptance of a reorganization plan. In *In re Allied Owners Corporation* (174 F. 2d 201), the Court stated:

> "Section 77B[20] is concerned with corporate reorganization. Its principal purpose was to provide relief against recalcitrant minority creditors or debtors unable to reach all creditors. * * * The law requires that a plan of reorganization be accepted by two-thirds of each class of creditors. If the trustee of a mortgage were to vote for all the bondholders on every plan which affected the security distinguishing the bond issue and making it a separate class, the two-thirds

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[19] The finding of the Court below is as follows (Appendix B, *infra*, p. 33):

> "And if Section 179 were thought to leave any doubt as to what that requirement is, such doubt would be dispelled by Section 198 (11 U. S. C. A. Sec. 598) which provides: 'An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee, who have not filed claims: Provided, however, that in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included.'"

The Court below obviously confused an indenture trustee's right to file claims which by the allowance thereof entitled the holders to vote with the strictures upon the right of the trustee to vote the allowed claims (see note 4 *supra*).

[20] While various substantial changes in the provisions of §77B were made in Chapter X the requirements of notice of plan hearings and the majority required for acceptance of a plan as conditions precedent for confirmation of a plan of reorganization remained unaltered (see Appendix A, *infra*, pp. 23-25).

requirement would be meaningless and one of the purposes of the law would be defeated. Congress, in legislating, did not place a trustee in the position of censor of plans of reorganization."[21]

5. The decision below turns squarely and solely on construction of the applicable federal statutes as matter of law. Clearly the question above presented is of importance in the administration of the federal bankruptcy laws. The decision of the Court below is so inconsistent in theory as to leave the intent and meaning of the applicable statute in a state of confusion. Settlement of the question by this Court is plainly in the public interest since it is likely to be presented in almost every bankruptcy proceeding involving corporations which have obligations outstanding under indentures and involving indenture trustees. If the decision of the Court below were permitted to stand, it would mean that minorities would not receive the Court's protection in its application of the law of the land as presented in Chapter X of the Bankruptcy Act. It is of particular importance that this question be settled in this Circuit, since New York is the financial center of the world and the question affects the many thousands of companies whose securities are traded in this center, as well as the many other thousands of small corporations whose obligations are not publicly traded.

6. The decision of the Court below holding that specific notice to stockholders and creditors of debtor Third Avenue Transit Corporation was not required to be given of

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[21] Note that Sec. 224 (4) of the Bankruptcy Act (11 U. S. C. A. 624 (4)) provides specifically that distribution under the plan after confirmation shall be made to creditors and stockholders (a) proof of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession as fixed claims or stock, liquidated in amount and not disputed.

the hearing on June 26, 1956 on approval of a completely new plan of reorganization is believed to be erroneous and in direct conflict with the statutory requirements of notice under Chapter X of the Bankruptcy Act and the procedural requirements of the bankruptcy rules of the District Court for the Southern District of New York.

The provisions of the Bankruptcy Act require that the stockholders and adjustment bondholders of debtor have

1) The right to be heard on all reorganization matters:

> "The debtor, the indenture trustee and any creditor or stockholder of the debtor shall have the right to be heard in all matters arising in a proceeding under this Chapter" (Section 206 of the Bankruptcy Act, 11 U. S. C. A., §606),

and

2) The right to be given notice of hearings on reorganization plans:

> "Notice of the time of any hearing as provided in Section 569 or Section 570 of this title, shall be given to the debtor, the creditors and stockholders, the indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission and such other persons as the Court may designate * * *" (Section 171 of the Bankruptcy Act, 11 U. S. C. A., §571).

The construction of the statutory requirements for notice of plan hearings is believed to be correctly enunciated by the Seventh Circuit in *In re National Realty Trust* (167 F. 2d 440) where the Court stated:

> "The fact that the Court is given exclusive jurisdiction of the debtor and the property does not give it power to enter an order affecting rights of interested parties, including stockholders, without notice and a hearing. In fact a reading of the Reorganization Act,

particularly the Chandler Act, shows the meticulous care which Congress exercised in requiring that notice be given at every step of the proceedings wherein the rights of interested parties might be affected. See Secs. 516(3), 561, 567(6), 571, 590, 597 and 622."

In *In re Bantam Car Co.* (Third Circuit), 193 F. 2d 616:

> "Unless notice is given as required by the Bankruptcy Act, the Court lacks the power to enter a valid order in the premises. * * * Much more than an abuse of legal discretion is involved for the Trial Court proceeded under an erroneous conception of the requirements of notice."

And in *Herbert V. Apartments Corporation* v. *Mortgage Guarantee Co.* (Third Circuit), 98 F. 2d 662:

> "It is our contention that whatever may be the agreement between individuals as to representation in proceedings in the case at bar, notice, as the various steps of the proceeding may require, must be sent to all who have the status of creditors and to the certificate holders since they have such status."

7. The form and manner in which notice of hearings for approval of a plan is to be given in proceedings under Chapter X in the District Court for the Southern District of New York is spelled out in Rule X-18 of the Bankruptcy Rules for that Court as follows:

> "Notice of a hearing under Section 169 or Section 170 of the Act shall be given by mail and shall be accompanied by a copy of the plan filed by the debtor in possession, or examiner, if any, or the Trustee."

It is not open to question that the stockholders and creditors of debtor did not receive a copy of the new re-

organization plan approved at the hearing on June 26, 1956, although they had received the original plan of November 26, 1952, as well as the Amended Plan of June, 1955.[22]

Since the new plan involved the purchase of the debtor by another transit company, and was a completely different plan from those previously submitted by the Trustee, the Court below is believed to have been in error in holding that the District Court had discretion to disregard the notice requirements of the Bankruptcy Act and the Bankruptcy Rules of the District Court.

8. The decision of the Court below in affirming the confirmation of a reorganization plan which has not been accepted or approved as required by statute and orderly procedure has sanctioned such a serious departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.[23]

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[22] In submitting the original plan in November, 1952 the Trustee stated that "Whenever notice is to be given under the Plan, the Court shall designate the time within which, the persons to whom, and the form and manner in which such notice shall be given. Unless otherwise specified by the Court, all such notices shall be given by the Trustee."

[23] On December 17, 1956 an order of consummation of the plan was entered by the District Court. The plan has not been substantially consummated as indicated in the following statements appearing the consummation order:

> "* * * WHEREAS, the Joint Plan provides for the distribution of (a) approximately $659,000 in cash and 2,848 shares of Capital Stock of FAC (Fifth Avenue Coach Lines, Inc.) to unsecured creditors and certain partially secured tort creditors (all of whom are hereinafter referred to as 'unsecured creditors');

(Continued on following page)

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

A. PHILIP WOOLFSON,
Attorney Pro Se.

Dated: January 25, 1957.

(Continued from preceding page)

(b) 333,240 shares of the Capital Stock of FAC to the holders of Third Avenue Railway Company Adjustment Income 5% Gold Bonds due 1960 (herein referred to as 'Adjustment Bonds'); and (c) $8,528,000 principal amount of bonds issued by Surface (hereinafter referred to as the 'New Bonds') together with $6,287,422 in cash to the holders of Third Avenue Railway Company First Refunding Mortgage 4% Gold Bonds due 1960 (herein referred to as 'Refunding Bonds'); and

* * *

WHEREAS, Mr. Woolfson has no right to appeal from the decision of the Court of Appeals but can petition the Supreme Court for a writ of certiorari which, if granted, would permit him to appeal to that court; and

WHEREAS, counsel for the Reorganization Trustee and counsel for FAC believe that if Mr. Woolfson petitions for a writ of certiorari, it will not be granted, and even if it should be granted, that it is extremely unlikely that the decision of the Court of Appeals would be reversed; and

* * *

WHEREAS, FAC and the Lending Banks do not believe said $4,881,090 and said shares of the Capital Stock of FAC should be distributed to the unsecured creditors and bondholders until the possibility of a reversal of the Confirmation Order ceases to exist; * * *."

APPENDIX A

Excerpts from Chapter X of the Bankruptcy Act Corporate Reorganizations

(Act of June 22, 1938, C. 575, 52 Stat. 840)

§520. Notices

Whenever notice is to be given under this chapter, the court shall designate, if not otherwise specified hereunder, the time within which, the persons to whom, and the form and manner in which the notice shall be given. Any notice to be given under this chapter may be combined, whenever feasible, with any other notice or notices to be given under this chapter. July 1, 1898, c. 541, §120 as added June 22, 1938, c. 575, §1, 52 Stat. 885.

§569. Preparation, filing, and hearing on plan; trustee appointed

Where a trustee has been appointed the judge shall fix a time within which the trustee shall prepare and file a plan, or a report of his reasons why a plan cannot be effected, and shall fix a subsequent time for a hearing on such plan or report and for the consideration of any objections which may be made or of such amendments or plans as may be proposed by the debtor or by any creditor or stockholder. July 1, 1898, c. 541, §169, as added June 22, 1938, c. 575, §1, 52 Stat. 890.

§571. Notice and time of hearing on plan

Notice of the time of any hearing, as provided in section 569 or section 570 of this title, shall be given to the debtor, the creditors and stockholders, the indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the court may designate. The judge may, upon the application of the trus-

tee, any creditor, indenture trustee, or stockholder, advance the time of such hearing. July 1, 1898, c. 541, §171, as added June 22, 1938, c. 575, §1, 52 Stat. 890.

§574. Entry of order and fixing time for acceptance of plan

After the hearing, as provided in section 569 or section 570 of this title, and, if a plan has been submitted to the Securities and Exchange Commission, as provided in section 572 of this title, then after the filing of the report or notice that it will not be filed, or after the expiration of the time for its filing, whichever first occurs, the judge shall enter an order approving the plan or plans which in his opinion comply with the provisions of section 616 of this title, and which are fair and equitable, and feasible, and shall fix a time within which the creditors and stockholders affected thereby may accept the same. July 1, 1898, c. 541, §174, as added June 22, 1938, c. 575, §1, 52 Stat. 891.

§579. Acceptance of plan; hearing for confirmation

After a plan has been accepted in writing, filed in court, by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed of each class, and, if the debtor has not been found to be insolvent, by or on behalf of stockholders holding the majority of stock, of which proofs have been filed and allowed, of each class, exclusive of creditors or stockholders or of any class of them who are not affected by the plan or whose claims or stock are disqualified pursuant to section 603 of this title, or for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 616 of this title, the judge shall fix a hearing, upon notice to the debtor, creditors, stockholders, indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the judge may designate, for the consideration of the confirmation of the plan

and of such objections as may be made to the confirmation. July 1, 1898, c. 541, §179, as added June 22, 1938, c. 575, §1, 52 Stat. 892.

§596. Filing and allowing proofs of claims; objections to allowances

After the approval of the petition the judge shall prescribe the manner in which and fix a time within which the proofs of claim of creditors and of the interests of stockholders may be filed and allowed. Objections by any party in interest to the allowance of any such claims or interests shall be heard and summarily determined by the court. July 1, 1898, c. 541, §196, as added June 22, 1938, c. 575, §1, 52 Stat. 893.

§597. Classification of creditors and stockholders

For the purposes of the plan and its acceptance, the judge shall fix the division of creditors and stockholders into classes according to the nature of their respective claims and stock. For the purposes of such classification, the judge shall, if necessary, upon the application of the trustee, the debtor, any creditor, or an indenture trustee, fix a hearing upon notice to the holders of secured claims, the debtor, the trustee, and such other persons as the judge may designate, to determine summarily the value of the security and classify as unsecured the amount in excess of such value. July 1, 1898, c. 541, §197, as added June 22, 1938, c. 575, §1, 52 Stat. 893.

§598. Claims by indenture trustee for all holders under trust

An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee, who have not filed claims: *Provided, however,* That in computing the majority necessary for the acceptance of the plan only the claims

filed by the holders thereof, and allowed, shall be included. July 1, 1898, c. 541, §198, as added June 22, 1938, c. 575, §1, 52 Stat. 893.

§603. Disqualification of votes on acceptance in absence of good faith

If the acceptance or failure to accept a plan by the holder of any claim or stock is not in good faith, in the light of or irrespective of the time of acquisition thereof, the judge may, after hearing upon notice, direct that such claim or stock be disqualified for the purpose of determining the requisite majority for the acceptance of a plan. July 1, 1898, c. 541, §203, as added June 22, 1938, c. 575, §1, 52 Stat. 894.

§616. Provisions of plan

A plan of reorganization under this chapter—

* * *

(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection.

§621. Confirmation by court

The judge shall confirm a plan if satisfied that—

(1) The provisions of subchapter VII, section 599, and subchapter X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this title;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge, and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy. July 1, 1898, c. 541, §221, as added June 22, 1938, c. 575, §1, 52 Stat. 897.

EXCERPTS FROM SEC. 77B OF THE BANKRUPTCY ACT (ACT OF JUNE 7, 1934, C. 424, 48 STAT. 912—SUPERSEDED BY CHANDLER ACT, CHAPTER X, C. 575, 52 STAT. 840).

"(c) Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him

* * *

(6) shall determine a reasonable time within which the claims and interests of creditors and stockholders may be

filed or evidenced and after which no such claim or interest may participate in any plan, except on order for cause shown, the manner in which such claims and interests may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, the division of creditors and stockholders into classes according to the nature of their respective claims and interests; and may, for the purposes of such classification, classify as an unsecured claim, the amount of any secured claim in excess of the value of the security therefor, such value to be determined in accordance with the provisions of section 57, clause (h), of this Act;

(7) shall cause reasonable notice of such determination and of all hearings for the consideration of any proposed plan, or of the dismissal of the proceedings, or the liquidation of the estate, or the allowance of fees or expenses, to be given creditors and stockholders by publication or otherwise;

* * *

"(e) (1) A plan of reorganization shall not be confirmed until it has been accepted in writing (whether before or after the filing of the petition or answer under this section) and such acceptance shall have been filed in the proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan and by or on behalf of stockholders of the debtor holding a majority of the stock of each class: Provided, however, That such acceptance shall not be requisite to the confirmation of the plan by any creditor or class of creditors (a) whose claims are not affected by the plan, or (b) if the plan makes provision for the payment of their claims in cash in full, or (c) if provision is made in the plan for the protection of the interests, claims, or liens of such creditor or class of creditors in the manner provided in subdivision (b),

clause (5), of this section: And provided further, That such acceptance shall not be requisite to the confirmation of the plan by any stockholder or class of stockholders (1) if the judge shall have determined either that the debtor is insolvent, or that the interests of such stockholder or stockholders will not be affected by the plan, or (2) if provision is made in the plan for the protection of the interests of such stockholder or class of stockholders in the manner provided in subdivision (b), clause (4), of this section. With such acceptance there shall be set forth, verified in such manner as the judge shall require, what, if any, contracts of the debtor are executory in whole or in part, and what unexpired leases have been rejected and surrendered.

* * *

"(f) After hearing such objections as may be made to the plan, the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible; (2) it complies with the provisions of subdivision (b) of this section; (3) it has been accepted as required by the provisions of subdivision (e), clause (1) of this section; * * *"

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 181—October Term, 1956.

(Argued November 8, 1956 Decided November 30, 1956.)

Docket No. 24362

In the Matters

of

THIRD AVENUE TRANSIT CORPORATION, *et al.*,

Debtors.

A. PHILIP WOOLFSON,

Appellant,

vs.

LESTER T. DOYLE, As Trustee in Reorganization, *et al.*,

Appellees.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appeals from orders of the United States District Court for the Southern District of New York, Edward J. Dimock, Judge.

Appellant, claiming to be a stockholder and creditor of Third Avenue Transit Corporation, appeals from three

separate orders, approving a plan of reorganization, confirming the plan, and denying a motion to set aside an order finding the debtor insolvent. Not reported below. Affirmed.

A. Philip Woolfson, Attorney Pro Se, New York City.

Saxe, Bacon & O'Shea, New York City (William J. O'Shea, John A. Kiser and Martin Fogelman, New York City, of Counsel), for Lester T. Doyle, Trustee in Reorganization.

Thomas G. Meeker, General Counsel, David Ferber, Assistant General Counsel, Washington, D. C. (Richard V. Bandler, Attorney, New York City, of Counsel), for Securities and Exchange Commission.

Kelley, Drye, Newhall & Maginnes, New York City (Frank H. Heiss, New York City, of Counsel), for The Hanover Bank, Indenture Trustee under the First Refunding Mortgage.

Wagner, Quillinan & Tennant, New York City (Sidney R. Nussenfeld, New York City, of Counsel), for Colonial Trust Company as Successor Trustee under the Adjustment Mortgage.

Peter Campbell Brown, Corporation Counsel, New York City (Sidney Brandes, New York City, of Counsel), for the City of New York.

Shearman & Sterling & Wright, New York City (Grayson M-P Murphy and Thomas R. Nangle, New York City, of Counsel), for Fifth Avenue Coach Lines, Inc.

Murphy, Block, Sullivan & Sawyer, New York City (John Dwight Sullivan, New York City, of Counsel), for O'Connell Committee for First Refunding Bondholders.

HAROLD P. SELIGSON and MORTON E. YOHALEM, New York City (Morton E. Yohalem, New York City, of Counsel), for Amott Committee for First Refunding Bondholders.

CHARLES POLETTI, HOFFMAN, BUCHWALD, NADEL & HOFFMAN and BUCHMAN & MUCHMAN, New York City (Charles D. Hoffman, New York City, of Counsel), for Imperial Bank of Canada, et al., Adjustment Income Bondholders.

KRESEL & MEYERSON, New York City (Samuel Meyerson, New York City, of Counsel), for Tinker Committee for Adjustment Bondholders.

BERGERMAN & HOURWICH, New York City (Joseph Calderon, New York City, of Counsel), for Smith Committee for Adjustment Bondholders.

HAYS, ST. JOHN, ABRAMSON & HEILBRON, New York City (Edward M. Garlock and Osmond K. Fraenkel, New York City, of Counsel), for Petitioning Creditors.

MEDINA, Circuit Judge:

A corporate reorganization of Third Avenue Transit Corporation was commenced by the filing of an involuntary petition in the District Court for the Southern District of New York on October 25, 1948. Various plans of reorganization were formulated and amended or modified. After numerous and prolonged hearings and consideration by the Securities and Exchange Commission and the Public Service Commission of the State of New York, a Joint Plan of Reorganization was finally evolved. This Plan was duly approved by the District Court; but, before the confirmation of the Plan, appellant, an alleged holder of common stock and at least one of the Adjustment Income Mortgage Bonds of the debtor, appeared on the scene

and made a series of motions to block the consummation of the Plan.

The matter came before us on the motion calendar on November 8, 1956, when appellees moved to dismiss the appeals, hereinafter described, as frivolous. As appellant's points were numerous, we proceeded, with the consent of all parties, to hear the appeals on the merits forthwith, an oral argument and on the briefs then and later submitted.

There are three appeals:

(1) From an order of September 11, 1956, denying appellant's motion to vacate an order of August 5, 1955, adjudging the debtor to be insolvent and to reopen the question of solvency for further consideration;

(2) From an order of July 26, 1956, approving the Joint Plan to Reorganization;

(3) From an order of October 8, 1956, confirming the Joint Plan of Reorganization.

Despite the unsubstantial and technical character of the miscellany of points urged upon us as ground for reversal, we have given each of them careful consideration. There is not a shred of merit in any of them.

I.

The insolvency of the debtor is abundantly established as of the date of the order of adjudication and long prior thereto. But appellant insists that the failure of the Court to require notice to the stockholders that his order had been entered "deprived them of the right to appeal," and that "since the requirements of due process were not complied with by the Appellees, the order of the District Court of August 5, 1955 with respect to debtor's insolvency should

be set aside." We fail to understand how anyone was in any sense "deprived" of the right to appeal, unless appellant is contending that the stockholders had received no notice that such an order might be entered. But the stockholders had been apprised of this likelihood in several ways. As recently as June 28, 1955, which was shortly before entry of the order complained of, notices had been mailed reminding them that under the trustee's plan "No provision is made for the stockholders of debtor Third Avenue since the assets of that debtor are insufficient to pay its creditors in full." The notice announced the time and place of the resumption of the hearings and stated, "Any creditor or stockholder has the right to appear in person or by duly authorized representative at the hearing and make objections or purpose amendments to the Trustee's Amended Plan of Reorganization, or propose another plan or plans of reorganization." This disposes of appellant's appeal No. 1.

II.

Appellant contends that the District Court lacked power to enter its order approving the plan because of failure to comply with the requirement of Section 171 of the Bankruptcy Act (11 U. S. C. Section 571) that "Notice of the time of any hearing, as provided in Section 169 * * * shall be given to * * * the creditors and stockholders * * *" Section 169 (11 U. S. C. Section 569) provides:

> "Where a trustee has been appointed the judge shall fix a time within which the trustee shall prepare and file a plan, or a report of his reasons why a plan cannot be effected, and shall fix a subsequent time for a hearing on such plan or report and for the consideration of any objections which may be made or of such amendments or plans as may be proposed by the debtor or by any creditor or stockholder."

It is not disputed that there was notice of the commencement of hearings following submission of the original plan by the trustee, as well as additional notices preceding approval of the plan. Appellant's position seems to be that further notice is required by the Act. We find no such requirement. On the contrary, if separate notice were required as a condition precedent to the consideration of every amendment or modification or to resumption of the hearings following a recess, it is plain that any party so minded could delay the proceeding indefinitely and cause needless and prohibitive expense.

The statute contemplates a continuous process which may culminate in the approval of a fair and equitable and feasible plan, initiated by the filing of the trustee's plan with widespread notice of the commencement of hearings. Creditors and stockholders and other interested persons have the right to be heard and to object or to propose amendments or modifications and even to file completely new plans. The notices of plan hearings uniformly state, as did the notice in this case, that the hearings may be adjourned from time to time without further notice other than the announcement of such adjournment in open court.

Appellant also contends that before approving the Plan the Court should have ordered notice by publication as well as notice by mail. He points to no authority to support this contention. Section 207 of the Act (11 U. S. C. Section 607) provides that, "Except where otherwise provided in this chapter, the judge may from time to time enter orders designating * * * the form and manner in which notice may be given," and Section 120 (11 U. S. C. Section 520) provides that, "Whenever notice is to be given under this chapter, the court shall designate, if not otherwise specified hereunder, * * * the form and manner in which such notice shall be given."

The objections urged by appellant do not establish failure to comply with Section 171.

Appellant also challenges the District Court's approval of the plan on the ground that the Court need not have submitted the plan to the New York State Public Service Commission under Section 178 (11 U. S. C. Section 578) since that body lacks jurisdiction to establish rates for the debtor corporation. Even if this were true, we fail to see how appellant could have been injured by such submission.

III.

In his third appeal, appellant urges that the order confirming the plan is invalid because of failure to comply with Section 179 (11 U. S. C. Section 579), which requires acceptance "by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed in each class." The undisputed facts are that some 84 per cent in amount of the holders of the adjustment mortgage income bonds who filed claims accepted the plan, but that these assenting bondholders represented less than two-thirds of the total issue. The question is simply whether acceptance by the holders of two-thirds of the entire issue is required or only by the holders of two-thirds of the amount claimed and allowed. The statute is explicit on the point, and we find little to recommend appellant's argument that it would be "ridiculous" to construe the statute as meaning what it says since acceptance by the holders of only a tiny fraction of the issue would be sufficient where only a few claims are filed. We think it not unreasonable to provide that if only a few creditors are available and interested enough to vote, they should determine acceptance or rejection of the Plan by their class. In any event, we are not at liberty to vary the requirement of the Act. And if Section 179 were thought to leave any doubt as to what that requirement is, such doubt would be dispelled by Section 198 (11 U. S. C. Section 598), which provides:

> "An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee, who have not filed claims: Provided, however, That in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included."

This section also disposes of appellant's contention that for purposes of determining the class, the acceptance of two-thirds of which was necessary, "it was clearly erroneous for the District Court Judge to require the Adjustment Bondholders individually to file proofs of claim."

Appellant's remaining points are frivolous on their fact, and we shall not discuss them.

The orders appealed from are affirmed.

APPENDIX C

In re KENILWORTH BLDG. CORPORATION,
KROESCHELL et al. v. BRITTAIN et al.

No. 6852.

Circuit Court of Appeals, Seventh Circuit.

July 14, 1939.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division; John P. Barnes, Judge.

Proceeding in the matter of the reorganization of the Kenilworth Building Corporation, debtor, wherein an amended reorganization plan was submitted by Joseph K. Brittain and others, as bondholders' committee. From a decree confirming the plan of reorganization, Roy Kroeschell and others appeal.

Reversed and remanded, with directions to set aside decree of confirmation and for further proceedings in accordance with opinion.

J. Kentner Elliott, of Chicago, Ill., for appellants.

Frederick Z. Marx and Joseph D. Lawyer, both of Chicago, Ill., for appellees.

Before EVANS, TREANOR, and KERNER, Circuit Judges.

TREANOR, Circuit Judge.

This is an appeal from a decree of the District Court confirming a plan of reorganization. The proceeding below was an involuntary one filed pursuant to Section 77B of the Bankruptcy Act,[1] the appellees being bondholders

[1] 11 U. S. C. A. §207.

and the petitioning creditors. The bonds were in default and foreclosure proceedings were pending in an Illinois state court at the date of the institution of reorganization proceedings.

The petition for reorganization was approved on June 14, 1938, as properly filed; and on July 15, 1938, the court, by order, fixed August 25, 1938 as a final date for the filing of claims of creditors. The order further provided that unless filed within such time no claim "may participate in any plan of reorganization herein, except on order of court for cause shown." It was further ordered that the trustee under the mortgage trust deed be authorized "to file a claim in this cause not only on behalf of said trustee under said trust deed individually but also on behalf of the holders of the bonds." Notice was thereafter issued to creditors, stockholders and claimants stating that the trustee was authorized to file a claim on behalf of the holders of the bonds.

In accordance with the foregoing the trustee filed a timely claim for the entire bond issue in the principal sum of $112,000; and this claim was allowed subject to deduction pro tanto for any duplicating claims which should be filed by individual bondholders.

Creditors holding bonds in the amount of approximately $30,000 and a bondholders' committee representing deposited bonds in the amount of $62,600 each proposed a plan. Both plans provided for the creation of a new corporation to acquire the debtor's assets and to issue shares in exchange for outstanding obligations of the debtor. The plans differed only in the following feature: The committee's plan provided that the shares should be issued to three trustees appointed by the court and held in trust for a period of ten years, such trust arrangement being subject to termination by 51% of the creditors. The court directed that only the committee's plan be submitted to the creditors for consideration, and upon submission sufficient creditors

filed dissents and objections to prevent confirmation of the plan.

The District Court was advised by counsel that the rejection of the plan was due to the antipathy of the creditors to the trust arrangement; but the court thereafter repeatedly informed counsel that no plan which did not include control through a trust arrangement for a definite term, subject to termination only by the court, would receive the confirmation of the court. Further, the court stated that it would not approve the committee's plan, which had been rejected by the creditors, because it provided for termination of the trust by a vote of a majority of the creditors. Thereafter, the bondholders' committee proposed an amended plan of reorganization from which was omitted the provision authorizing termination of the trust by a vote of 51% of the creditors. The court ordered this plan to be filed and submitted to creditors.

In connection with the submission of the plan the court approved a communication to all of the creditors which stated in substance that the court would not approve any plan differing from the submitted plan; that the court would dismiss the proceedings unless such plan was accepted; and that if so dismissed the time and expenses incurred would be lost and jurisdiction revert to foreclosure proceedings. The communication contained the following statement: "The failure to execute and forward to the clerk of the court a written acceptance of the plan of reorganization is equivalent to a vote against the confirmation of the amended plan * * * This communication is being sent to you by authority of the court and it has been submitted to and approved by the judge before whom the case is now pending." The court entered two orders, the first of which authorized the committee to send the communication and a copy of the plan to bondholders *who had deposited their bonds with the committee*, and the second order provided that the committee should print copies of

the communication and deliver them to the debtor and that the debtor should "cause *to be sent by mail to the creditors* * * * (*other than the depositing first mortgage bondholders*) a copy of said communication which shall be inclosed with the plan of reorganization * * *" (our italics).

After a hearing on confirmation of the committee's amended plan, the plan was confirmed despite the fact that consents to the plan represented only $47,800 worth of claims out of a total of $112,000 on the outstanding bond issue. The total consents to the plan fell far short of representing two-thirds of the claims filed and allowed if the claims filed by the trustee under the trust deed securing the bondholders are taken into consideration in the computation. The District Court, however, disregarded all the claims filed by the trustee and allowed by the court and considered only the claims filed by the bondholders' committee or by the individual claimants.

In support of the foregoing action the court ruled, and appellees contend, that Section 198 of the Chandler Act[2] is applicable and requires that the claims filed only by the trustee must be disregarded. The District Court also made a finding "that under the old practice, the trustee would not be entitled to vote or his claim would not be counted."

[1-3] We are of the opinion that under Sec. 77B the total amount of claims, two-thirds of which must be represented by assenting creditors, includes the claims filed by an indenture trustee which are allowed. The language of Sec. 77B is definite and unambiguous and makes it mandatory that written acceptances be filed by or on behalf of the creditors holding two-thirds in amount of the claims allowed.[3] Perhaps we should emphasize that the act requires an affirmative expression of acceptance but does not require a dissent. The necessary meaning is that if creditors hold-

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[2] 52 Stat. 893, 11 U. S. C. A. §598.

[3] 11 U. S. C. A. §207 (e) (1); 11 U. S. C. A. §207 (f) (3).

ing more than one-third in amount of the claims allowed do not cause written acceptances to be filed the plan cannot be lawfully confirmed. The evident purpose of the provision is to insure that any plan which is adopted will have the advantage of the affirmative approval and support of creditors holding at least two-thirds in amount of claims allowed. For the purpose of filing written acceptances no distinction is made between claims filed by an indenture trustee and allowed and claims filed by individual creditors or by someone expressly authorized to file for them. The only restriction placed upon claims is that they be claims of creditors and that they be allowed. If a claim has been filed and allowed nothing in the act authorizes the striking of such claim from the amount of claims to be considered for purposes of acceptance of the plan. In short, the total amount of all claims which have been allowed constitutes the amount of claims, two-thirds of which must be voted for acceptance. In the instant case the trustee was expressly authorized to file a claim on behalf of all bondholders, the amount of the claim being subject to reduction pro tanto by subsequent filings of bondholders' committee or individual creditors. The trustee's claim was allowed and such allowance has not been expunged. The total amount of claims allowed was $112,000.

[4, 5] It does not follow from the foregoing that under Sec. 77B an indenture trustee has implied authority to file written acceptances. Since the language of Sec. 77B expressly requires that written acceptances be filed by or on behalf of creditors holding two-thirds in amount of the claims allowed, we think the reasonable construction is that anyone filing written acceptances on behalf of creditors must be specially authorized. But the relationship and duty of the indenture trustee to the bondholders is such that he would have implied authority to file claims for them even in the absence of a special authorization in the deed of trust. The court recognized the existence of this

authority by authorizing the trustee to file claims for the bondholders subject to the right of the bondholders to withdraw his authority by filing their own claims or by expressly authorizing someone else to do so. The relationship and duty of the indenture trustee to the bondholders would not imply authority to bind these bondholders to an acceptance of a particular plan of reorganization.

We conclude that Sec. 77B requires the claims filed by the indenture trustee and allowed to be considered in determining the amount of the claims, two-thirds of which had to be represented by creditors assenting to the plan.

The finding of the District Court to the effect that under the old practice the claim filed by the trustee and allowed "would not be counted" is without effect in view of our construction of the language of Sec. 77B. Furthermore, no evidence appears in the record to support such a finding and apparently the only specific reference to the old practice is found in a statement of counsel for the bondholders' committee during the hearing on confirmation. The following is quoted from his statement: "Under 77B, there was no express provision authorizing the trustee to file a claim for the benefit of all outstanding bonds, but the trustees almost universally did so, and 77B provided it was necessary to have the affirmative acceptance of two-thirds of the claims allowed. There was no provision therein expressly providing the claim of the trustee was not to be taken into consideration in determining the two-thirds. However, in order to play safe, we always in those cases got two-thirds of the entire issue."

The Chandler Act, Section 276 (c)[4] provides generally that Section 77B shall continue in force as to proceedings thereunder pending at the effective date of the Chandler Act; but Section 276 (c) (2) provides as an exception to

[4] 52 Stat. 905, 11 U. S. C. A. §676.

section 276 (c) that "if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable * * *." The The petition in the instant case was approved more than three months before the effective date of the amendatory act. The District Court ruled that the application of Section 198 of the Chandler Act was practicable. This Section reads as follows: "An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee, who have not filed claims: Provided, however, That in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included." The District Court held that under this provision only the claims filed by the holders, or by the committee, and allowed, should be considered.

[6, 7] Granting that the District Court correctly construed Section 198 of the Chandler Act, we are of the opinion that the application of Section 198 is not practicable in view of the rulings of the court in the course of the reorganization proceedings prior to the submission of the plan, and especially in view of the understanding which the bondholder-creditors must have had. It is first necessary to consider the meaning of "practicable" as used in Section 276 (c) (2) of the Chandler Act. The Circuit Court of Appeals for the Third Circuit construes the word "practicable as follows:[5] "Practicable * * * is not synonymous with possible, but means feasible, fair and convenient." In view of what had transpired prior to the ruling of the court at the time of the report on acceptances, it was not "feasible, fair and convenient" to apply Section 198. Up

[5] *In re Philadelphia & Reading Coal & Iron Co.*, 3 Cir., 104 F. 2d 126, 127.

to that time the conduct of the proceedings in respect to the adoption of the plan obviously was on the assumption that all claims filed and allowed had to be considered in determining whether creditors holding two-thirds in amount of claims allowed were in favor of acceptance.

The court's order of July 15, 1938 fixed the time limit for the filing of claims and provided that unless claims were filed within such time no claim "may participate in any plan of reorganization herein, except an order of court for cause shown." At the same time the court also ordered that the trustee under the Mortgage Trust Deed securing the bondholders was authorized "to file a claim in this cause not only on behalf of said trustee * * * individually but also on behalf of the holders of the bonds." Notice was thereafter issued to creditors, stockholders and claimants stating that the trustee was authorized to file a claim "on behalf of the holders of the bonds." When the plan which was confirmed by the court was submitted to the creditors for acceptance it was accompanied by a communication which contained the statement that "failure to execute and forward to the clerk of the court a written acceptance of the plan of reorganization is equivalent to a vote against the confirmation of the amended plan." The court entered an order authorizing the bondholders' committee to send the communication and a copy of the plan to bondholders who had deposited their bonds with the committee, and also provided that the committee should print copies of the communication and deliver them to the debtor and that the debtor should "cause to be sent by mail to the creditors and stockholders of and claimants against said debtor and any of its property (other than the depositing first mortgage bondholders) * * * a copy of said communication, which shall be inclosed with the plan of reorganization." The record shows that when the original plan of the bondholders' committee was submitted "dissents from and

objections to the plan of the reorganization were filed by the holders of a sufficient amount of bonds and certificates of deposit to prevent approval of the plan as submitted." Apparently holders of bonds generally, as well as holders of certificates of deposit with the committee, were treated as creditors who were entitled to file written acceptances of the plan. There is no indication that any holder of a bond whose claim had been filed by the indenture trustee and allowed had any reason to believe that it was necessary for him to refile his claim in order for his claim to be counted for purposes of acceptance, as a part of the total claims.

In view of the situation it was not "practicable" to apply Section 198 of the Chandler Act which, if correctly construed by the District Court, presupposes that all bondholders whose indenture trustee has filed claims will understand that it is necessary to refile their claims, and will have an opportunity to refile them, in order to have their claims taken into consideration in computing the majority necessary for the acceptance of the plan. In order for Section 198 to be "practicable" in any substantial and real sense it would have been necessary for the District Court to have set aside its order limiting the time for the filing of claims and to have afforded holders of bonds an opportunity to refile their claims for allowance with the understanding that such action was necessary in order to entitle their claims to be taken into consideration in the computation of the total amount of claims, of which two-thirds in amount must be represented by creditors who file written acceptances.

It would not be practicable to apply a provision of the Chandler Act if it authorizes confirmation of a proposed plan in case the plan is approved by creditors holding two-thirds in amount of about $74,000 of claims when the reorganization proceeding had been conducted on the assumption, and upon the understanding of all interested

parties, that the proposed plan could not be confirmed by the court unless it should be approved by the holders of two-thirds in amount of $112,000. The application of the section of the Chandler Act brought about a result which, upon the basis of the written acceptances, it was impossible to attain under Section 77B; and since it was not invoked until after the plan had been submitted to holders of claims and until it was too late for holders of claims which had been filed by the indenture trustee to refile their claims, the result was to prevent their participation in the consideration of the plan. The application of Section 198 at the stage of the proceedings at which it was invoked could be construed "practicable" only in the sense that it afforded a strictly formal procedural means to secure acceptance of the plan. But in view of the stage of progress in the reorganization proceedings the application was impracticable in any substantial sense since it could not be said to be adapted to the effectuation of the true purposes of the reorganization proceeding.

We hold that the District Court's decree of confirmation of the plan of reorganization must be reversed and the cause remanded with directions to the District Court to set aside its decree of confirmation and for further proceedings not inconsistent with this opinion.

Decree reversed.

Office - Supreme Court, U.S.
FILED
FEB 19 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 714

In the Matters

of

THIRD AVENUE TRANSIT CORPORATION, *et al.*,
Debtors.

A. PHILIP WOOLFSON,
Petitioner,

against

LESTER T. DOYLE, As Trustee in Reorganization, *et al.*,
Respondents.

BRIEF OF REORGANIZATION TRUSTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: February 14, 1957.

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BRIEF OF REORGANIZATION TRUSTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introductory.

A. Philip Woolfson (hereinafter "Petitioner"), seeks a writ of certiorari to review that part of a judgment of the United States Court of Appeals for the Second Circuit, entered November 30, 1956, which affirmed orders of the United States District Court for the Southern Dis-

trict of New York, Hon. Edward J. Dimock, presiding, approving (8-13)* and confirming (27-32) a Plan of Reorganization (hereinafter "the Joint Plan") under Chapter X of the Bankruptcy Act for Third Avenue Transit Corporation (hereinafter "Third Avenue") and subsidiaries.

Petitioner became a stockholder of record of Third Avenue on July 27, 1956 (60). Almost a year earlier, on August 5, 1955, the District Court had entered an order finding Third Avenue to be insolvent (34-5) and on August 8, 1955, the New York Stock Exchange had suspended trading in Third Avenue stock (60). Petitioner asserts that he is also an Adjustment bondholder. He did not, however, file a proof of claim as such and his sole status of record is as a stockholder.

The Public Service Commission of the State of New York has certified that the Joint Plan is in the public interest (207-12) and the Securities and Exchange Commission has reported that the Joint Plan is fair and equitable, and feasible (149-70).

Following the action of those regulatory bodies, the Joint Plan was approved by the District Court, accepted by large majorities of both classes of bondholders, and by the other creditor groups, and then confirmed by the Court.

Only Petitioner appealed from the orders approving and confirming the Joint Plan.

On November 30, 1956 the Court of Appeals unanimously affirmed in all respects the orders of the District Court (238 F. 2d 665).

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* References are to the Joint Appendix unless otherwise indicated.

Questions Presented.

(1) Did the Court of Appeals and the District Court err in their determinations that the claims filed by the holders of Adjustment bonds determined the voting base of that class, and that the acceptance of the Joint Plan by the holders of more than two-thirds in amount of those claims constituted due acceptance by that class under Chapter X of the Bankruptcy Act?

(2) Did the Court of Appeals and the District Court err in their determinations that the notice given to creditors and stockholders with respect to the hearing at which the District Court considered approval of the Joint Plan complied with the requirements of Chapter X of the Bankruptcy Act?

Statement.

(a) Petitioner's Statement.

The statement on behalf of Petitioner is inaccurate and incomplete in a number of respects. For example, Petitioner states that the Joint Plan "had been approved by the District Court on July 24, 1956 at a hearing without notice to the debtor's stockholders and other interested parties" (P.,* p. 5). Statutory notice of the commencement of the hearing at which the Joint Plan was approved was in fact given, and the hearing was adjourned from time to time by announcement in open court as it was stated in the original notice that it might be (*post*, pp. 23-27). In addition to the original notice required by the statute, two additional notices of the continuance of the hearing were sent to all creditors and stockholders (*post*, p. 28).

* References preceded by "P." are to the petition for certiorari.

Petitioner also states that the Joint Plan was "the third reorganization plan filed by the Trustee" (P., p. 6). The Joint Plan was not "filed by the Trustee." It was filed by an Adjustment Bondholders Committee (*post,* p. 7). Some thirty plans, amendments and other plan proposals were filed in the District Court (R.* 24,694-99). The Joint Plan, as it finally evolved, contained many features appearing in prior plans. From time to time amendments were made to various plans to meet changing conditions and the objections and suggestions of the various bondholder groups, the Securities and Exchange Commission, and the Public Service Commission. New features were added, some old features retained, and others eliminated.

(b) The Debtor Corporations.

At the commencement of the reorganization proceedings, Third Avenue and its transit subsidiaries operated a wholly intrastate bus system in the City of New York and to a lesser extent in the adjacent County of Westchester. A history of the system, a description of the companies which comprised the system, and an exposition of the causes leading to the bankruptcy proceedings are set forth in the report of the Securities and Exchange Commission (72-83).

(c) The Reorganization Proceedings.

The reorganization proceedings were commenced by the filing of an involuntary petition, under Chapter X of the Bankruptcy Act, against Third Avenue in the District Court on October 25, 1948. On June 21, 1949 the petition,

* References preceded by "R." refer to the record filed in the Court of Appeals.

as amended, was approved by the Court upon the consent of Third Avenue. On the same day a voluntary petition for the reorganization of Third Avenue's operating transit subsidiaries was also approved and the same trustees were appointed for all debtors (1-2).

The major developments in the reorganization proceedings leading up to consummation of the Joint Plan were as follows:

Pursuant to an order of the Court, Lester T. Doyle, Trustee in Reorganization (hereinafter "the Trustee") sent a copy of a Plan of Reorganization proposed by him and a notice of hearing thereon to all creditors, stockholders and other interested parties (Exs.* 1, 2).

The notice informed them that at the hearing to be held on January 15, 1953, they had "the right to appear * * * and make objections or propose amendments to the Plan of Reorganization, or to propose another plan or plans of reorganization." The notice also informed them that it was anticipated that the Court would announce a subsequent date on which it would hear testimony and that the hearing might be adjourned thereafter from time to time with notice of the adjourned dates to be announced at the hearing (Ex. 1). The hearing was adjourned to further dates from time to time by announcement in open court until the Joint Plan was finally approved. Various amendments, objections and other plans were filed (3).

There was widespread participation in these proceedings by numerous protective committees for both Refunding and Adjustment bondholders, their indenture trustees, the Securities and Exchange Commission, committees on be-

* References preceded by "Ex." are to exhibits introduced in evidence by the Trustee in the proceedings in the District Court.

half of tort creditors and representatives of stockholders (7). A vast amount of testimony, covering thousands of pages, was given by expert witnesses on behalf of the Trustee, the Refunding bondholders, the Adjustment bondholders and the stockholders (R. 24,693-94).

In July 1954 the Trustee sent a report to all creditors and stockholders advising them, among other things, of the progress of the plan hearings, and of their continuance (R. 23,774).

On June 19, 1955 the Trustee submitted an Amended Plan (84) and, pursuant to an order of the Court, sent a notice of the continuance of plan hearings and a summary of the Amended Plan to all creditors and stockholders (36-42; 62-63).

On August 5, 1955 "The absence of any hope for the stockholders became so clear* that [the District Judge] was constrained to declare that they had no interest in the property" (I**-7; 34-5).

On the same day the Court made an order finding that six plans were worthy of consideration and referring them to the New York Public Service Commission and to the Securities and Exchange Commission (84). Following hearings before the Public Service Commission, that Com-

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* Before Petitioner and the other stockholders can have any interest, it is necessary that the claims of the creditors, aggregating in excess of $70,000,000 (83; I-106) be satisfied in full (*Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106). The Securities and Exchange Commission found a value of between $16,500,000 and $17,000,000 (127) and the N. Y. Public Service Commission found a value not in excess of $15,000,000 (180; 186). The Trustee and his independent engineer testified to valuations in the range of $20,000,000 to $23,000,000 (276; 269). Under the Joint Plan the creditors will realize in excess of $23,000,000.

** References preceded by "I" refer to booklet entitled "Information for Voting on Joint Plan of Reorganization."

mission filed a report, dated January 9, 1956, finding that none of the plans met with its approval (171-86).

Thereafter the Trustee filed a Plan dated February 15, 1956. The Court found this plan worthy of consideration and referred it to the Public Service Commission and the Securities and Exchange Commission (4). The Plan was thereafter modified and, on March 29, 1956, the Public Service Commission filed its decision approving it (4).

On May 9, 1956, however, the Securities and Exchange Commission filed an Advisory Report which concluded that the modified Plan was not fair and equitable, and feasible (70-145). Further modifications were made to the modified Plan and it was again referred to the Securities and Exchange Commission. On May 23, 1956 that Commission filed a supplemental report that the modified Plan still did not meet with its approval (146-148).

On June 1, 1956 a Committee for Adjustment bondholders filed a plan of reorganization involving the acquisition by Fifth Avenue Coach Lines, Inc. (formerly New York City Omnibus Corporation) of a controlling interest in the Third Avenue Transit System. On June 4, 1956 the same Committee filed a substitute plan and on June 5, 1956 the Court entered orders referring the Trustee's above Plan, as further modified, and the said Committee's plan to both Commissions (5).

Further negotiations between the Trustee and Fifth Avenue Coach Lines, Inc. (hereinafter "Fifth Avenue") resulted in Fifth Avenue substantially improving its offer and the said Committee's plan was amended under date of June 26, 1956 to incorporate the additional benefits for the creditors. The Trustee thereupon withdrew his Plan, and adopted the said Committee's plan, as amended (the "Joint Plan").

By order dated June 27, 1956, the Court referred the Joint Plan to the two commissions. Under date of July 17, 1956 the Public Service Commission certified its approval of the Joint Plan (207-12) and on July 23, 1956 the Securities and Exchange Commission filed a favorable Advisory Report, finding that the Joint Plan was fair and equitable, and feasible (149-70).

On July 26, 1956 the Court made its order approving the Joint Plan (8-13) and on August 13, 1956 the Court made an order fixing the procedure for voting on the Joint Plan and providing for the transmittal of information and ballots to security holders and creditors. Pursuant to such order, copies of the Joint Plan, and a substantial amount of information, were sent to all creditors and stockholders (Ex. 456). The voting period was extended from time to time and additional information was transmitted to creditors in an effort to secure a large and representative vote (Ex. 458).

On September 28, 1956 the Trustee reported to the Court that the Joint Plan had been accepted by the requisite majority of each of the classes of creditors entitled to vote thereon. Proofs of claim and ballots were filed by the holders of approximately 77% in amount of the Refunding bond issue and over 99% in amount of these claims were voted to accept the Joint Plan. Proofs of claim and ballots were filed by the holders of approximately 72% in amount of the Adjustment bond issue and approximately 84% in amount of these claims were voted to accept the Joint Plan (22-26, 390-91).

On September 29, 1956 the Trustee sent notice of a hearing on confirmation of the Joint Plan to all creditors and stockholders (Ex. 459). Such hearing was held and

Petitioner's objections were heard (213-36). On October 8, 1956, the Court entered its order confirming the Joint Plan (27-32).

The Joint Plan.

The Joint Plan* provides for the acquisition by Fifth Avenue, an operator of buses in the City of New York (150-2), of all of the stock of the Reorganized Company in exchange for $4,881,090 in cash and approximately 336,088 shares of the capital stock of Fifth Avenue, and for the issuance by the Reorganized Company of $8,528,000 of new 6% bonds.

(a) Refunding Bondholders.

The holders of the Third Avenue 4% First Refunding Mortgage bonds receive a $575 new 6% Bond of the Reorganized Company and $424 in cash for each $1,000 original face amount Refunding bond.**

The District Judge held that the Refunding Mortgage claim of approximately $14,250,000 was receiving the equivalent of payment in full (I-8). His conclusion is abundantly supported by all of the Refunding bondholder groups, participating actively in the proceeding, who joined in supporting the Joint Plan (I-30) and by the bondholders themselves. Over 99% of the Refunding bond claims filed by the holders thereof were voted to accept (22, 390-91).

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* For a summary of the Joint Plan see I-1-2; the entire Plan is printed at I-30-41.

** $350 was paid on account of each such bond during the reorganization proceedings. This is an amount in excess of the accruing interest thereon.

(b) Adjustment bondholders.

The holders of Third Avenue Adjustment Mortgage 5% Income bonds receive 15 shares of Fifth Avenue stock for each $1,000 principal amount Adjustment bond.*

The stock of Fifth Avenue is listed on the New York Stock Exchange and is selling for approximately $28 per share, indicating a value, in terms of market price, of over $9,000,000 (152), for the stock to be distributed pursuant to the Joint Plan.

All protective committees for Adjustment bondholders endorsed the Joint Plan (I-30).** Approximately 84% of the Adjustment bond claims filed by the holders thereof were voted to accept (23, 390-91).

Petitioner's participation in proceedings before the District Court.

On June 21, 1956, more than a month before the District Court approved the Joint Plan, Petitioner filed objections (R. 24,345-47). On June 28, 1956 the Trustee's counsel wrote Petitioner and advised him that if he had anything to say in support of his objections, he should attend the hearing which had been adjourned to July 5, 1956. Petitioner acknowledged receipt of this communication but did not attend the adjourned hearing. (R. 23,416; 22,629.) Thus it cannot be disputed that Petitioner had current

* General unsecured creditors receive small amounts of the Fifth Avenue stock. No provision is made for the stockholders of Third Avenue because it is insolvent (*ante* p. 6).

** Several representatives of Adjustment bondholders did not support the Joint Plan prior to and during the voting period. However, no persons claiming to be or represent Adjustment bondholders (other than Petitioner) voiced any opposition to confirmation of the Plan (213-38) although notice of the confirmation hearing had been sent to all bondholders (27).

notice of the proceedings then pending before the District Court.

After the Joint Plan was approved, but before it was confirmed, Petitioner made a number of motions (43-55), including motions for orders (a) reopening the question of the insolvency of debtor Third Avenue and for the appointment of an appraiser at the expense of the debtor's estate; (b) for the examination of the Chairman of the Securities and Exchange Commission and the Director and Chief Counsel of its Division of Corporate Regulation and (c) removing the Trustee.

Petitioner made grave allegations of wrongdoing* and then offered no proof whatever in support of them (239-58). His motions were all denied (33).

Petitioner appeared at the hearing to consider confirmation of the Joint Plan and was heard at length (213-36).

Proceedings in the Court of Appeals.

Petitioner appealed from (a) the order approving the Joint Plan, (b) the order confirming the Joint Plan and (c) the order denying his motions, and raised numerous points which need not be discussed here.

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* He accused the Trustee, among other things, of "a complete lack of interest in the welfare of the stockholders"; an "inimical attitude to the stockholders"; having "deliberately concealed from this Court the fact that the debtor has become solvent" (47); numerous breaches of his "fiduciary duty to the stockholders" (48); having "wilfully disregarded" an order of the court (49); "misrepresentations" (50) and failing to send the stockholders copies of reports (54).

The Securities and Exchange Commission was also the object of his wrath. He charged that "the Commission has failed to give this Court the impartial and expert administrative assistance * * * as required by the Bankruptcy statutes" (46).

On November 30, 1956, the Court of Appeals, in a unanimous opinion,* after "careful consideration" of the "miscellany of points" raised by Petitioner, concluded:

"There is not a shred of merit in any of them."••

The Present Status of the Reorganization Proceedings.

All corporate and other steps necessary to consummate the Joint Plan, except those referred to below, were effectuated prior to December 17, 1956.

On December 17, 1956, pursuant to an order of consummation of the District Court, a closing was held at which $4,881,090 in cash and 336,088 shares of stock of Fifth Avenue were received by the Trustee from Fifth Avenue in exchange for the stock of Surface Transit, Inc. (the Reorganized Company). The estates in reorganization were turned over to Surface Transit, Inc. and its subsidiaries, and the $8,528,000 of new bonds were issued by Surface Transit, Inc. The cash and securities to be distributed pursuant to the Joint Plan were deposited with the Exchange and Distribution Agents. Distribution thereof to the bondholders and other creditors entitled to receive them has been delayed because of the pendency of the petition herein.

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* The opinion is printed in the petition (pp. 26-33) and is reported in 238 F. 2d, at p. 665.

** Italics are ours throughout this brief.

Trustee's Contentions.

(1) Chapter X of the Bankruptcy Act explicitly provides that only the claims filed by the holders thereof are to be included in computing the majority necessary for the acceptance of the plan. There is no conflict whatever with the decision of the Court of Appeals for the Seventh Circuit in *In re Kenilworth Bldg. Corporation* (105 F. 2d 673). Chapter X changed the law. The *Kenilworth* case was decided under Section 77B, the predecessor reorganization statute, which did not contain the provision, introduced by Chapter X, that "in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included."

(2) The notices given to creditors and stockholders prior to the approval of the Joint Plan by the District Court complied in all respects with the requirements of Chapter X and, in fact, several notices were given in addition to the notices required by the statute. Furthermore, since Petitioner had actual notice, he would in no way have been prejudiced even if such notices had not complied with such provisions.

POINT FIRST

The holding of the Court of Appeals that the majority necessary for acceptance of the Plan is determined by the claims filed by the holders thereof, is required by the plain language of the statute.

Adjustment bonds in the face amount of $22,215,900 are outstanding in the hands of the public (83). A proof of claim for the entire issue was filed by the indenture trustee thereof. The holders of Adjustment bonds constitute a class of creditors for the purpose of the acceptance of the Joint Plan (11). Proofs of claim were filed by the holders of $15,893,000 face amount of Adjustment bonds, representing 72% of the issue. The holders of $13,328,000 face amount of such bonds voted to accept the Joint Plan (390-91); representing approximately 84%* of the claims filed by the holders thereof but less than 66⅔% of the entire issue.

Petitioner argues that the acceptances of two-thirds of the entire issue ($22,215,900) were required for the confirmation of the Joint Plan. His contention is squarely contradicted by the explicit provisions of Chapter X.

(a) Applicable Provisions of Chapter X.

Section 179 (11 U.S.C. Section 579) provides, in pertinent part, as follows:

> "After a plan has been accepted in writing, filed in court, *by or on behalf of creditors holding two-*

* Petitioner erroneously states that the Courts below determined the percentage of acceptances by dividing the amount of the acceptances by the amount voting on the Joint Plan (P., pp. 5, 11). On the contrary, the percentage was arrived at by dividing the acceptances by the amount of the claims filed by the holders thereof. In this case the difference is slight since substantially all of the bondholders who filed proofs of claim voted on the Joint Plan (23, 390-391).

thirds in amount of the claims filed and allowed of each class, * * * the judge shall fix a hearing, * * * for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation."

Section 198 (11 U.S.C. Section 598) supplements Section 179 and provides as follows:

> "An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee, who have not filed claims: *Provided, however,* That *in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included.*"

The Court of Appeals, addressing itself to Petitioner's contention, stated:

> "* * * appellant urges that the order confirming the plan is invalid because of failure to comply with Section 179, which requires acceptance 'by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed in each class.' The undisputed facts are that some 84 per cent in amount of the holders of the adjustment mortgage income bonds who filed claims accepted the plan, but that these assenting bondholders represented less than two-thirds of the total issue. The question is simply whether acceptance by the holders of two-thirds of the entire issue is required or only by the holders of two-thirds of the amount claimed and allowed. *The statute is explicit* on the point, * * *.
>
> * * *
>
> "* * * And *if Section 179 were thought to leave any doubt* as to what that requirement is, *such doubt would be dispelled by Section 198* * * *.
>
> * * *

> "This section also disposes of appellant's contention that for purposes of determining the class, the acceptance of two-thirds of which was necessary, 'it was clearly erroneous for the District Court Judge to require the Adjustment Bondholders individually to file proofs of claim.' "

The statute plainly means what it precisely says. There is not a scintilla of authority to the contrary.

Petitioner, however, indulges in algebra* and argues that:

> "• • • The decision of the Court below is so inconsistent in theory as to leave the intent and meaning of the applicable statute in a state of *confusion*" (P., p. 13).

We respectfully suggest that the only "*confusion*" exists in his petition. Elsewhere, the law is clear. In *Collier on Bankruptcy* (14th Ed., Vol. 6, p. 2865) it is said:

> "Section 198 withholds from an indenture trustee the right to vote the claims for which he files a proof of claim and reserves that right for the individual security holders under the indenture. It is provided 'That in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included.' *This changes the law as it existed under §77B, and means that* even though an indenture trustee files a proof of claim for all security holders under the indenture, *only those holders who have independently filed their claims and secured their allowance will be counted in computing the necessary acceptances of the plan under §179.*"

---

* Algebra is not required to determine whether the requisite percentage of acceptances has been received. Simple arithmetic suffices. It is only necessary to divide the amount of the acceptances by the amount of the claims filed by the holders thereof. If, as here, the resultant percentage is 66⅔ or more, the plan has been accepted.

The plain meaning of the provisions of Section 198 is confirmed by the many articles which the enactment of Chapter X brought forth.

Alfred B. Teton, Esq., in his article *"Reorganization Revised"* (48 Yale L. J., 573, 599-600) states:

> "* * * Since Section 77B(e)(1) required consents of ⅔ of all claims allowed, and since claims filed by the trustee were 'allowed claims,' the consents of ⅔ of all creditors, and not only of those who filed individual claims, were necessary. Adoption of such a majority standard, which required balloting by bondholders, including the indifferent or ignorant, unknown or unlisted, made difficult the task of getting the requisite number of consents for even the fairest of plans. Such difficulties could have been avoided by permitting the trustee to vote on behalf of non-voting bondholders, but reluctance to permit the modification of creditors' rights by third persons, * * * led to the general denial of the trustee's right to vote. *To obviate the consequences of making the total outstanding debt the basis for majority computations** while denying vot-

* There is unanimity among the scholars of the Bar, both as to the purpose and the effect of Section 189.

Alfred N. Heuston, Esq., *Corporate Reorganizations* (38 Col. Law Review, 1199, 1218): "A change has been made, however, where bonds or other securities issued pursuant to an indenture are involved. Only the claims filed by the securityholders themselves, and allowed, will be taken into account in computing the acceptances necessary for the confirmation of a plan. The claim filed by the indenture trustee on behalf of all securityholders who have not filed claims will not be considered in this connection. This will make it unnecessary to obtain acceptances from the holders of two-thirds of an entire bond issue. It will only be necessary to obtain acceptances from the holders of two-thirds of the amount of bonds upon which claims have been filed by the holders themselves—conceivably amounting to only a small fraction of the entire bond issue."

John Gerdes, Esq., *Corporate Reorganizations* (52 Harvard Law Review 1, 33-34): "* * * Since securities under trust indentures are

ing privileges to the indenture trustee, a proviso was added to Section 198 to the effect that 'in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included.' While this section facilitates the securing of consents, it severely reduces the number of bondholders entitled to vote on a plan. Section 179 provides that the consents of ⅔ of the claims allowed shall be necessary for adoption of the plan. Since Section 198 provides that only claims filed by individual bondholders and allowed by the court shall be taken into consideration in determining the voting base, the conclusion necessarily follows that only those who filed individual claims are entitled to vote. * * *"

(b) Cases Cited by Petitioner.

No extended discussion of the cases cited by Petitioner is called for. Only one case (*In re Kenilworth Building Corp.*, 7 Cir., 105 F. 2d 673) presented the question of the determination of requisite acceptances, and every case cited by him was decided under the former Section 77B and not under the present Chapter X.

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often issued to bearer, with the holders frequently unknown, the necessary majority is computed on the basis of claims filed by the individual bondholders."

Thomas K. Finletter, Esq., *Bankruptcy Reorganization* (p. 502): "* * * Although an indenture trustee may file a claim on behalf of all holders of securities issued under the indenture, only claims filed by the holders of the securities and allowed are included in computing the total amount of creditors in the class for voting purposes."

Emmet McCaffery, Esq., *Corporate Reorganization* (26 California L. R. 643, 654): "* * * An indenture trustee, apparently regardless of whether the provisions of the indenture specifically authorize such action, may file claims for all holders of securities issued under the indenture, but in computing the majority necessary for the acceptance of the plan only the claims filed by holders, and allowed, are to be included."

In the *Kenilworth* case the reorganization proceedings were commenced under Section 77B, prior to the enactment of Chapter X, and had advanced under the provisions of Section 77B to the consideration of confirmation of a plan. At the hearing to consider confirmation, it appeared that only $47,800 out of a total of $112,000 of outstanding bonds had filed acceptances of the plan. The District Court, in finding acceptances by two-thirds of the class, disregarded the claims filed by the trustee of the bond issue and considered only the claims filed by the individual bondholders. The District Judge ruled that Section 198 of Chapter X (*ante*, p. 15) was applicable and that, even under prior practice, the claim of the indenture trustee would not be counted (p. 675).

The Court of Appeals first directed its attention to the construction of the applicable provision of Section 77B and concluded that, under that statute, the claims filed by the indenture trustee were required to be included in determining the voting base.

Chapter X contains a provision that, if the petition in a pending proceeding under Section 77B was approved more than three months before the effective date of the Chapter X, the provisions of Chapter X shall apply to such proceedings to the extent that the Judge shall deem their application "practicable" (Section 276(c)(2), 11 U.S.C. 676(c)(2)). The District Judge ruled that the application of Section 198 of Chapter X was practicable and construed that section as did the District Judge and the Court of Appeals in the instant proceeding.

The Court of Appeals in the *Kenilworth* case, directing itself to this question, stated:

> "Granting that the District Court correctly construed Section 198 of the Chandler Act [Chapter X],

> we are of the opinion that the application of Section 198 is not practicable in view of the rulings of the Court in the course of the reorganization proceedings prior to the submission of the plan * * *."

The Court of Appeals construed "practicable" to mean "feasible, fair and convenient" (p. 676) and held that, since the reorganization had proceeded on the assumption that all claims had to be considered in determining the requisite number of acceptances, it was not "practicable" to exclude the claims filed by the indenture trustee when there had been no opportunity for bondholders to refile their claims so that they would be included in the voting base.

Thus, it appears that the decision in the *Kenilworth* case is limited to (a) the calculation of the voting base under Section 77B and (b) a construction of the word "practicable" in Section 276(c)(2) of Chapter X to meet the facts there presented. There is nothing whatever in the opinion even suggesting any different construction of Section 198 than that required by its plain meaning and adopted by the courts below.

The other cases cited by Petitioner were also decided under Section 77B, the prior statute, and none of them presented for decision any question as to the determination of the voting base.

In re 333 No. Michigan Avenue Building Corp. (7 Cir., 84 F. 2d 936) held that Section 77B was constitutional. *Texas Hotel Securities Corp.* v. *Waco Development Co.* (5 Cir., 87 F. 2d 395) held that a claim would not be disqualified from voting because it was acquired during the pendency of the proceeding.

Petitioner also argues that the instant decision "is in direct conflict with the principle enunciated by an Appeals

Court of the same Circuit in 1943," citing *"In re Allied Owners' Corporation* (174 F. 2d 201)." No such case appears in that volume or was decided by the Court of Appeals in 1943. In 1934, however, the Court of Appeals for the Second Circuit decided a case with the same name, which is reported in 74 F. 2d 201. This case, decided under Section 77B, involved "the sole question of a claimed right of the trustee to vote * * * on the plan of reorganization" (p. 202).

Petitioner frequently asserts (P., pp. 7, 9, 10, 12) that the decision of the Court of Appeals in the instant case is "in conflict" with these cases. There can hardly be a "conflict" between cases decided under two different statutes, the latter of which was expressly designed to change the provisions of the former.

We respectfully urge that there is no occasion whatever for a review by this Court with respect to the determination of the requisite percentage of acceptances for confirmation of a plan. The holding of the District Judge, unanimously affirmed by the Court of Appeals, is clearly required by the plain meaning of the applicable statute and is in accord with all the writers. There is no "conflict." In fact, there is no authority to the contrary.

POINT SECOND

All requirements of Chapter X with respect to notice to creditors and stockholders were complied with.

Petitioner poses the question "whether the failure of the trustee of debtor to transmit to stockholders and creditors notice of a hearing on approval of a completely new plan of reorganization pursuant to the require-

ments of Chapter X * * * is not violative of due process" (P., p. 2). Although Petitioner refers to "due process" in his "question", he makes no argument with respect thereto.

Petitioner's question assumes that the Trustee failed to transmit the notice required by Chapter X. This assumption is contrary to the fact. Notice pursuant to Section 171 (11 U.S.C. Section 571) was sent to all creditors and stockholders (Exs. 1, 2)* and the hearing was thereafter adjourned from time to time as the notice stated would be the case.**

Petitioner urges that "* * * the Court below is believed to have been in error in holding that the District Court had discretion to disregard the notice requirements of the Bankruptcy Act * * *" (P., p. 16). The Court of Appeals made no such holding.

On the contrary, the District Court and the Court of Appeals, have unanimously held that there was *no* "disregard" or "failure of the Trustee" to transmit any notice required by Chapter X. Both courts have found, after careful consideration, that all requirements of notice were complied with.

Petitioner cites several cases for the proposition that the notice requirements of Chapter X must be complied with (P., pp. 14-15). This is unquestionably true; but the decisions in no way suggest that on the facts of this case there was any inadequacy of notice.

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* The notice was accompanied by a copy of the orignal plan filed by the Trustee, in compliance with Bankruptcy Rule X-18 of the Southern District of New York.

** The Court of Appeals appropriately commented:

> "The notices of plan hearings uniformly state, as did the notice in this case, that the hearings may be adjourned from time to time without further notice other than the announcement of such adjournment in open court."

Requirements for the Development of a Plan.

A review of the careful, legislative requirements for the development of plans of reorganization under Chapter X, and of the record, will demonstrate that the holding of the courts below that there was compliance with all notice requirements is beyond question.

(a) First Required Notice—The reorganization trustee is required to make an investigation and a report, among other things, on the property, liabilities and financial condition of the debtor, and to send copies thereof to creditors and stockholders together with an invitation to "submit to him suggestions for the formulation of a plan, or proposals in the form of plans" (Section 167, 11 U.S.C. Section 567).

This was done (Trustees' Report and Notice, dated November 28, 1951; R. 23,685-86).

(b) Second Required Notice—The trustee is required to prepare and file a plan (or a report why a plan cannot be effected) and the court is required to "fix a subsequent time for a hearing on such plan or report and for the consideration of any objections which may be made or of such amendments or plans as may be proposed by the debtor or by any creditor or stockholder" (Section 169, 11 U.S.C. Section 569).

"Notice of the time of any hearing, as provided in section 169 * * * of this Act, shall be given to the debtor, the creditors and stockholders * * *" (Section 171).

This notice was given (Exs. 1, 2) and the hearing was adjourned, by announcement in open court, to further dates from time to time until the Joint Plan was finally approved.

The Court of Appeals commented thereon as follows:

> "It is not disputed that there was notice of the commencement of hearings following submission of the original plan by the trustee, as well as additional notices preceding approval of the plan. Appellant's position seems to be that further notice is required by the Act. We find no such requirement. On the contrary * * *.
>
> The statute contemplates *a continuous process which may culminate in the approval of a fair* and equitable and feasible *plan, initiated by the filing of the trustee's plan with widespread notice of the commencement of hearings. Creditors and stockholders* and other interested persons *have the right to be heard* and to object or to propose amendments for modifications *and even to file completely new plans.*"

There is no requirement that a separate notice be given for each amendment or new plan that may be proposed during the course of the hearing.*

Petitioner refers to the Joint Plan as a "completely new plan" (P., p. 14) and a "completely different plan" (P., p. 16). The Joint Plan, as it finally evolved from the protracted proceedings, contained many features appearing in prior plans. The provisions with respect to the Third Avenue stockholders were identical with those which appeared in all previous plans filed by the Trustee

---

* In this reorganization, some thirty plans, amendments, and other plan proposals were proposed (24,694-99). As the Court of Appeals succinctly stated:

> "* * * if separate notice were required as a condition precedent to the consideration of every amendment or modification or to the resumption of hearings following a recess, it is plain that any party so minded could delay the proceeding indefinitely and cause needless and prohibitive expense."

and the bondholders' committees. No participation was provided because Third Avenue was hopelessly insolvent (*ante*, p. 6).

(c) Securities and Exchange Commission—"After the hearing, as provided in section 169 * * *, and before the approval of any plan, as provided in section 174 of this Act, the judge * * * shall, if [the] indebtedness exceeds $3,000,000, submit to the Securities and Exchange Commission for examination and report the plan or plans which the judge regards as worthy of consideration" (Section 172, 11 U.S.C. Section 572).

This also was done. A number of plans which were regarded by the District Judge as worthy of consideration were referred to the Securities and Exchange Commission for examination and report (*ante*, pp. 6-8).

"The judge shall not enter an order approving a plan submitted to the Securities and Exchange Commission until after the Securities and Exchange Commission has filed its report thereon * * *" (Section 173, 11 U.S.C. Section 573).

This also was done. Before the District Judge entered his order approving the Joint Plan, the Securities and Exchange Commission had filed its report thereon (149-170), concluding "that this plan is fair and equitable and feasible" (149).

(d) Public Service Commission—"In case a debtor is a public utility corporation, wholly intrastate, subject to the jurisdiction of a State commission having regulatory jurisdiction over such debtor, a plan shall not be approved, as provided in section 174 of this Act, unless such State commission shall have first certified its approval of such plan as to the public interest therein and the fairness thereof" (Section 178, 11 U.S.C. Section 578).

This also was done. The N. Y. Public Service Commission certified its approval of the Joint Plan (*ante*, p. 8).

(e) Order of Approval—"After the hearing, as provided in section 169 * * * of this Act, and, if a plan has been submitted to the Securities and Exchange Commission, as provided in section 172 of this Act, then after the filing of the report * * *, the judge shall enter an order approving the plan or plans which in his opinion comply with the provisions of section 216 of this Act, and which are fair and equitable, and feasible, and shall fix a time within which the creditors and stockholders affected thereby may accept the same" (Section 174, 11 U.S.C. Section 574).

This also was done. The District Judge entered the order approving the Joint Plan after the Public Service Commission had certified its approval, the Securities and Exchange Commission had filed its favorable report and he had found that the Joint Plan complied with the provisions of Section 216 of Chapter X (11 U.S.C. Section 616) and was fair and equitable, and feasible (8-13).

(f) Third Required Notice—Provision is made for the transmission of the plan of reorganization and information concerning it to creditors and stockholders after approval of the plan (Section 175, 11 U.S.C. Section 575). This must be done before the commencement of voting on the plan (Section 176, 11 U.S.C. Section 576).

This was done (Ex. 456).

(g) Fourth Required Notice—Following approval by the Court, and a favorable vote, notice is required of the hearing on the confirmation of the plan (Section 179, 11 U.S.C. Section 579).

Section 179 provides:

> "* * * the judge shall fix a hearing, upon notice to the debtor, creditors, stockholders, * * * and such other persons as the judge may designate, for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation."

This was done. The District Judge fixed a hearing and provided for notice thereof (14-17). Such notice was given (27; Ex. 459). The hearing was had, Petitioner appeared, and the Court considered his objections (213-38).

(h) Order of Confirmation—After the hearing on confirmation provided for in Section 179, the judge shall confirm a plan if satisfied that the plan is fair and equitable, and feasible and that the other requirements in Section 221 have been met. This is the culmination of the development of a plan of reorganization as at this time the plan becomes binding upon all creditors and stockholders (*post*, p. 29).

The Court, being satisfied that the Joint Plan was fair and equitable, and feasible and that the other requirements had been met, entered the order confirming the Joint Plan (27-32).

Thus it appears that *the statute contemplates a series of steps* in the proceeding and that the Congress has provided for the following notices in connection therewith (i) *notice* of the opportunity of security holder participation in the formulation of the original plan; (ii) *notice of the hearing to consider the original plan and such amendments, objections* and *other plans* as may be submitted; (iii) *notice* (including a copy of the plan) at the time of voting and (iv) *notice of the hearing to consider confirmation of the plan.* All of these notices were duly given.

Additional Notices Given in This Proceeding

In addition to the above four notices which Chapter X requires be given in connection with the development of a plan of reorganization (all of which were given), the following two additional notices were given during the course of the development of the Joint Plan:

> **(a) In July 1954 a report was sent by the Trustee to all creditors and stockholders notifying them, among other things, of the progress of the plan hearings and of their continuance (R. 23,774).**
>
> **(b) In June 1955 all creditors and stockholders were sent further notice, among other things, of the continuance of the plan hearings (36-42; 62-63).**

Accordingly, we respectfully submit that the District Court and the Court of Appeals were clearly right in holding that there had been full compliance with the statutory requirements of notice. Petitioner's repeated statements to the contrary, unaccompanied by any argument or authority whatsoever, do not create any issue meriting a review by this Court.

POINT THIRD

Even if the notice given to creditors and stockholders with respect to the hearing at which the District Court approved the Plan had not complied with the requirements of Chapter X, Petitioner would not have been prejudiced.

The record of Petitioner's participation in the proceedings shows that he had current notice of the hearing at which the District Court was considering the approval of the Joint Plan (*ante*, p. 10).

In addition, the *approval* of the Joint Plan in no way affected the substantive rights of Petitioner. A plan does not become binding upon creditors and stockholders until it is *confirmed*. Section 224 (11 U.S.C. Section 624) provides that

> "Upon *confirmation* of a plan (1) *the plan* and its provisions *shall be binding* upon * * * all creditors and stockholders * * *."

That the order *approving* the Joint Plan did not affect the substantive rights of Petitioner is manifest from Section 180 (11 U.S.C. Section 580) which provides:

> "The order of the judge *approving* a plan, as provided in section 174 of this Act, shall not affect the right of * * *, a creditor, * * * or stockholder to object to the *confirmation* of the plan."

Petitioner was heard at length at the confirmation hearing (213-36).

It thus appears that even though the required notices prior to the approval of the Joint Plan had not been sent (and in fact they were sent), Petitioner would in no way have been prejudiced by such failure.

CONCLUSION

There is no occasion for review by this Court. The petition should be denied.

Respectfully submitted,

WILLIAM J. O'SHEA
Attorney for Lester T. Doyle, Trustee, Respondent.

WILLIAM J. O'SHEA,
JOHN A. KISER,
MARTIN FOGELMAN,
of Counsel.

Dated: February 14, 1957.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 714

A. PHILIP WOOLFSON, *Petitioner*

v.

LESTER T. DOYLE, As Trustee in Reorganization, et al.[1]

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 26-33) is reported at 238 F. 2d 665. There was no opinion by the District Court except a memorandum opinion accompanying its order approving the plan of reorganization, which opinion did not deal with the issues here involved.[2]

[1] The Securities and Exchange Commission is a statutory party to this reorganization proceeding pursuant to Section 208 of the Bankruptcy Act (11 U.S.C. 608).

[2] The facts giving rise to one of the issues had not yet occurred (Question 1, *infra*); the other issue (Question 2, *infra*) had not been raised.

JURISDICTION

The judgment of the Court of Appeals was entered on November 30, 1956. The petition for certiorari was filed on January 25, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under Chapter X of the Bankruptcy Act, the requisite two-thirds acceptance by classes of creditors of a plan of reorganization is to be computed on the basis of the amount of individual proofs of claim filed or on the basis of the entire amount of the outstanding securities for which claims have been filed by an indenture trustee.

2. Whether, under Chapter X of the Bankruptcy Act, notice given at the commencement of hearings on a plan of reorganization and on objections, amendments or other proposals is sufficient or whether further notice is necessary of the continued hearings on amended plans or other proposals.

STATUTE INVOLVED

There are involved various provisions of Chapter X of the Bankruptcy Act, primarily Sections 169 (11 U.S.C. 569), 171 (11 U.S.C. 571), 179 (11 U.S.C. 579) and 198 (11 U.S.C. 598). These and other sections of the Act are set forth in Appendix A to the petition (pages 19-25).

STATEMENT

On November 6, 1952, the trustee filed a plan of reorganization and on that date an order was entered fixing a time for a hearing on the plan, on objections or amendments thereto, and on other plan proposals. Copies of the plan and notice of hearing were sent by

mail, among others, to all known creditors and stockholders of record (R. 3). In accordance with the terms of the notice, from the date of the commencement of these hearings early in 1953 and until the approval of a "Joint Plan" of reorganization in July, 1956, the hearings to consider approval of plans of reorganization proceeded continuously by way of adjournment from date to date. During that continous hearing numerous proposals were advanced by creditors and stockholders or their representatives; in addition, pursuant to orders of the court, the Securities and Exchange Commission and the New York State Public Service Commission reported upon plans of reorganization or modifications referred to them.[3]

In June, 1955, after the filing by the trustee of an amended plan (R. 3), another notice was mailed to all known creditors and stockholders of record noting the continuance of the hearings and summarizing the contents of the trustee's amended plan (R. 36-42; 62-67). And in December, 1955, during the pendency of the hearings, a further notice of continued hearings was mailed to the debtors' known creditors. Moreover, apart from these additional notices, the trustee in June, 1954, transmitted to creditors, stockholders and other interested parties copies of his Fifth Report, which reviewed, among other developments, the course of hearings to that time and advised of their continuance.

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[3] A report was filed by the Securities and Exchange Commission pursuant to Section 173 (11 U.S.C. 573) of the Bankruptcy Act on May 8, 1956 (R. 70-145) and two supplemental reports were filed thereafter (R. 146-170). These reports contain a detailed description of the debtors' business and their history prior to and during the proceeding (R. 71-86). They also summarize the provisions of the Joint Plan (R. 153-157), the approval and confirmation of which the petitioner seeks to review.

On July 26, 1956, the District Judge approved the Joint Plan of Reorganization (all other proposals having been abandoned or withdrawn), which had been certified as in the public interest by the New York State Public Service Commission and which had been found fair and equitable, and feasible by this Commission (R. 11).

After approval of the Joint Plan, an order was entered on August 13, 1956, pursuant to Section 175 of the Act (11 U.S.C. 575), directing that there be sent to creditors and stockholders affected by the plan, the plan, an approved summary thereof, the judge's opinion approving the plan, and a summary of this Commission's advisory reports, together with relevant financial and other material. The order directed the submission of the Joint Plan to those persons affected by the plan and entitled to vote. The trustee's report with respect to the acceptance of the plan shows that 77.4% in amount of Refunding Bondholders had filed proofs of claim entitling them to vote and that of these 99.2% had accepted; 71.5% in amount of Adjustment Income Bondholders had filed proofs of claim entitling them to vote and of these 83.8% had accepted (R. 22-26; 390-391). On the basis of these acceptances of the plan, an order was made fixing a hearing to consider confirmation of the plan or such objections as might be made to confirmation and directing notice of such hearing, pursuant to Section 179 of the Act (11 U.S.C. 579), to the debtors, their creditors and stockholders and others (R. 14-18).

After petitioner and others appeared and had been heard in objection to confirmation (R. 213-238), the judge confirmed the plan on October 8, 1956.

ARGUMENT

The District Court and the Court of Appeals both held that the Plan of Reorganization had been properly accepted by the requisite majorities, by classes, of the individual claims filed and allowed and that all notice provisions of the Bankruptcy Act had been fully complied with. These decisions are clearly correct and present no conflict, or inconsistency whatever, with the ruling of any lower court. Accordingly, there is no need for further review.

1. Under Chapter X of the Bankruptcy Act, voting upon a plan is by classes with acceptance, in the case of creditors (constituting the only classes of security holders in this proceeding entitled to vote), required by those "holding two-thirds in amount of the claims filed and allowed" (Section 179). While Section 198 (11 U.S.C. 598) provides for the filing of claims by an indenture trustee on behalf of the entire class of holders "of securities issued pursuant to the instrument under which he is trustee," it contains an express proviso that " . . . in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof . . . shall be included." That the proof of claim filed by the indenture trustee is intended "to protect bondholders", while voting majorities are to be computed on the basis of claims filed by individual holders, is amply supported by the legislative history of Chapter X.[4] Further, as noted in

[4] "Section 198 empowers indenture trustees to protect bondholders under indentures by filing proofs of claims for such bondholders who have not themselves filed their claims. It is provided that only the claims filed by the holders thereof, and allowed, are to be included in computing the majority requisite to the acceptance of a plan." (S. Rep. No. 1916, 75th Cong., 3rd Sess.

the brief of the reorganization trustee in opposition, pages 11-12, text and other writers unanimously agree not only that this is the clear and plain meaning of the statute, but also that the 1938 amendments of the Bankruptcy Act effected a change in the voting procedures theretofore employed under Section 77B (11 U.S.C. 207 (1934 ed.)).

Petitioner alleges a conflict upon the basis of *In re Kenilworth Building Corporation,* 105 F. 2d 673 (C.A. 7); *In re 333 North Michigan Avenue Building Corporation,* 84 F. 2d 936 (C.A. 7); *Texas Hotel Securities* v. *Waco Development Co.,* 87 F. 2d 395 (C.A. 5); *In re Allied Owners' Corporation,* 74 F. 2d 201 (C.A. 2). (Pet. 9-12.) Each of these cases was decided under Section 77B of the Bankruptcy Act, the predecessor to Chapter X. Express provision for acceptance by creditors "holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan" was required (Section 77B(e)(1), 11 U.S.C. 207(e) (1934 ed.)); there was no provision comparable to the present Section 198. Thus, under Section 77B the entire outstanding issue of securities, for which the indenture trustee files proof of claim, was the voting base for the acceptance of a plan. The change effected by the 1938 amendment was intended to overcome the difficulties encountered in procuring a fixed amount of acceptances, particularly in those

(1938) 32. See also Hearings on H.R. 8046 before House Judiciary Committee, 75th Cong., 1st Sess. (1937) 299.)

Participation in the plan is also assured, notwithstanding the failure to file an individual proof of claim, by Section 224(4) (11 U.S.C. 624(4)), which provides for participation where "claims or stock have been listed by the trustee or scheduled by the debtor in possession . . . ." Invariably issues of public securities are so listed.

situations involving bearer securities. There is thus no conflict.

In the instant proceeding, it is manifest not only that the computation of the voting majorities was appropriately made in accordance with the Bankruptcy Act, but also that the voting base (the aggregate of individual proofs of claim filed and allowed) was adequately representative of each class.

2. Petitioner urges that the order approving the Joint Plan prior to its submission to the creditor classes for acceptance was improperly made because no general notice of the consideration of that particular plan was given. Petitioner's contention that such notice is required finds no basis in the statute and arises from a misconception of the notice provisions of Chapter X as to plan promulgation.

After the appointment of a trustee, the Act requires the submission of a report respecting the affairs of the debtor to all creditors and stockholders and others (Section 167(5) (11 U.S.C. 567(5)) and the invitation from them of suggestions for the formulation of a plan (Section 167(6) (11 U.S.C. 567(6)).[5] The trustee is then required to file a plan, or a report why no plan can be effected, and the judge is required to fix a hearing to consider such plan or report and "any objections which may be made or of such amendments or plans as may be proposed by the debtor or by any creditor or stockholder" (Section 169 (11 U.S.C. 569)). Notice of that hearing is, by Section 171 (11 U.S.C. 571), required to be given to, among others, all creditors and stockholders.

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[5] "The trustee under this provision is the 'clearing house' for such proposals and plans". Sen. Rep. No. 1916, 75th Cong., 3rd Sess. (1938) 30.

A continuous process of hearings then begins, looking toward the approval of such plan or plans as may be found to be "fair and equitable, and feasible". The process encompasses not only the presentation of testimony and evidence but also the submission of amendments, modifications or other plan proposals, the reference, in appropriate cases, of those plan proposals regarded by the judge as worthy of consideration to this Commission for examination and report (Section 172 (11 U.S.C. 572)), and, as in this case, where the debtor is an intrastate utility corporation, certification as in the public interest of any plan which the judge will be requested to approve (Section 178 (11 U.S.C. 578)).*

After the initial notice required by Section 171 of the Act and until approval by the judge of a plan or plans, the Act provides for no further notice of additional plan proposals or of any other intermediate step in the hearing proceedings relating to plans. The initial notice of hearings uniformly, as it did in this case (Trustee's Ex. 2 to hearings on plan), advises of the right to be heard and to file objections, amendments or other proposals and that the hearings may be adjourned from time to time without further notice other than the announcement of such adjournment in open court. Apart from questions of expense, a requirement for notice of each plan proposal would involve a procedure so cumbersome as to render the process of plan promulgation almost unworkable. It would also make available a

* In many instances, after the submission by this Commission of its Advisory Report, further amendments or modifications intended to meet the Commission's views are filed and then referred to the Commission; in such instances the Commission has filed supplemental reports.

powerful weapon to one seeking to delay or obstruct the proceeding.

Moreover, after a plan has been approved by the judge it is transmitted to all creditors and stockholders affected for their vote thereon, and thereafter the Act assures to the parties the independent right to object to its confirmation. The hearing to consider confirmation of the plan is required by Section 179 to be upon notice to all creditors and stockholders, among others, and the Act provides further that the prior order of approval "shall not affect the right of the debtor, a creditor, indenture trustee, or stockholder to object to the confirmation of the plan" (Section 180 (11 U.S.C. 580)). It is the confirmation of a plan of reorganization which makes it "binding upon the debtor . . . and upon all creditors and stockholders. . . ." (Section 224(1) (11 U.S.C. 624(1)).

The notice provisions in connection with promulgation of a plan in this proceeding have been fully complied with and none of the cases relied on by the petitioner (Pet. 14-15) give any indication to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY 1967.

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MAR 2 7 1957
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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 714

IN THE MATTERS

of

THIRD AVENUE TRANSIT CORPORATION, *et al.*,

Debtors.

A. PHILIP WOOLFSON,

Petitioner,

against

LESTER T. DOYLE, as Trustee in Reorganization, *et al.*,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 714

IN THE MATTERS

of

THIRD AVENUE TRANSIT CORPORATION, *et al.*,

Debtors.

A. PHILIP WOOLFSON,

Petitioner,

against

LESTER T. DOYLE, as Trustee in Reorganization, *et al.*,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Supreme Court of the United States:

SIRS:

Petitioner petitions this Court for rehearing of its order of March 11, 1957 denying petitioner's above-noted petition for certiorari on the following grounds:

1. The Securities and Exchange Commission exceeded its authority in submitting a brief in opposition to the aforementioned petitions for certiorari; the Solicitor-Gen-

eral of the United States exceeded his authority in submitting such brief on behalf of the S.E.C. to this Court; this Court erred in giving consideration to such brief.

2. The authority of the Securities and Exchange Commission to appear as a party in the instant case in limited by Section 172 of the Bankruptcy Act, 11 U.S.C.A. Sec. 572. In Chapter X proceedings the function of the Securities and Exchange Commission is solely to submit to the District Court an advisory opinion with respect to proposed reorganization plans.

3. The Securities and Exchange Commission has, in an affidavit presented to the District Court in opposition to petitioner's motion to examine the Securities and Exchange Commission (R. p. A68-69), established the limits of its authority in the instant case.

4. The Securities and Exchange Commission has apparently adopted the philosophy that the end justifies the means. This is a philosophy that is alien to our judicial tradition.

For the foregoing reasons petitioner requests this Court for rehearing of order denying petitioner's petition for certiorari in the above-entitled matter.

Respectfully submitted,

A. PHILIP WOOLFSON,
Attorney Pro Se.

Certificate

I do hereby certify that the within petition is restricted to the grounds specified in the applicable provisions of Rule 58 of the Supreme Court Rules and that it is presented in good faith and not for purposes of delay.

A. PHILIP WOOLFSON,
Attorney Pro Se.

Dated: March 25, 1957